THE RIGHT TO COUNSEL IN EVICTION PROCEEDINGS: A FUNDAMENTAL RIGHTS APPROACH

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> "Summary eviction proceedings are the order of the day. Default judgments in eviction proceedings are obtained in machinegun rapidity, since the indigent cannot afford counsel to defend. Housing laws often have a built-in bias against the poor. Slumlords have a tight hold on the Nation."[1] —Justice Douglas

ABSTRACT

Every day in the United States, thousands of tenants are plunged into the uncertainty of eviction proceedings. At best, this process forces tenants to enter a complex and fear-inducing web of legal proceedings; at worst, it causes families to become homeless and enter a cycle of poverty that is not easy to escape. Yet approximately 90% of tenant-litigants are forced to navigate the labyrinth of eviction proceedings without counsel representation, notwithstanding the fact that counsel representation dramatically helps tenants by preventing improper evictions and leveling the playing field against represented landlords. This Note argues that counsel representation is critical to the integrity of eviction proceedings. It surveys the literature and data from cities that provide tenants with counsel representation to underscore the importance of representation in eviction proceedings, and it seeks to locate a constitutional right to counsel for tenants facing eviction proceedings. In so doing, it posits that the language and interpretation of the Fourteenth Amendment's Due Process Clause may

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1. Williams v. Shaffer, 385 U.S. 1035, 1040 (1967), *denying cert. to* 222 Ga. 334, 149 S.E.2d 668 (1966) (Douglas, J., dissenting).

provide a constitutional right to counsel through the Supreme Court's development of substantive due process.

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INTRODUCTION

Arleen arrived at Room 400 of the Milwaukee County Courthouse for her eviction hearing on a snowy December 23rd, two days before Christmas.[2] Housing court used to pause for the holiday season, but the city had stopped this practice due to pressure from landlords.[3] That Arleen was standing in the court at all for her eviction proceeding was notable. Approximately 70% of tenants due in housing court do not show up.[4] Waiting alone in the courtroom for nearly two hours, her landlord finally motioned to her that their turn had arrived. "Are you behind on your rent, ma'am?" the housing judge asked. Arleen was unaware that her answer could destroy any chance she had of holding onto the apartment she and her two young boys had been living in. Perhaps if she had been prepared, her fortunes might have been different. She responded "yes," and with that, her eviction was solidified.[5] She was to move out within a week.

On average, approximately 3.6 million eviction actions are filed against tenants in the United States each year, resulting in 1.5 million eviction judgments.[6] Indeed, between 2000 and 2016, landlords filed just under 37 million eviction actions, with 15.5 million resulting in eviction judgments.[7] And in the wake of the dual public health and economic difficulties brought on by the COVID-19 pandemic, an estimated 14 million tenants remained at risk of eviction from their homes as of September 2021.[8]

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2. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 100 (2016) [hereinafter DESMOND, EVICTED].
3. *Id.* at 101.
4. *Id.* at 96 ("Roughly 70 percent of tenants summoned to Milwaukee's eviction court didn't come. The same was true in other major cities."); *see also id.* at 358 n.4 (referencing a 2011 Milwaukee study in which interviewers took attendance in eviction court over a six-week period and found that 945 out of 1,328 tenants summoned to court did not appear, with most ultimately being evicted).
5. *Id.* at 104; *see also id.* at 362 n.16 ("In Milwaukee and many cities across the United States . . . . [i]t's the *what* not the *why* that matters . . . the court typically does not care why tenants fell behind, only that they did.") (internal quotations omitted).
6. Ashley Gromis, *Eviction: Intersection of Poverty, Inequality, and Housing*, EVICTION LAB, https://www.un.org/development/desa/dspd/wpcontent/uploads/sites/22/2019/05/GROMIS_Ashley_Paper.pdf [https://perma.cc/T9BS-KPGS].
7. *National Estimates: Eviction in America*, EVICTION LAB, https://evictionlab.org/national-estimates/ [https://perma.cc/8YF9-D2QT].
8. Dana Rubinstein & Jazmine Hughes, *New York Halted Evictions. But What Happens When the Ban Ends?*, N.Y. TIMES (Sept. 1, 2021), https://www.nytimes.com/2021/01/01/nyregion/nyc-eviction-moratorium-shelters.html [https://perma.cc/7BPR-VF2E]; *see* Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk* 1, NAT'L LOW INCOME HOUS. COAL. (2020), https://nlihc.org/sites/default/files/The_Eviction_Crisis_080720.pdf [https://perma.

Yet, evictions do not spontaneously arise. A landlord, like any litigant, must convince a court to affirm their right to remove a person or family from their dwelling. The way in which these eviction proceedings play out, however, presents significant concerns about the efficacy of the American legal system. As of 2012, "90 percent of landlords [were] represented by attorneys and 90 percent of tenants [were] not."[9] This stark contrast in attorney representation places tenants at a significant disadvantage, as poor tenants' inability to pay for lawyers all too frequently results in evictions that might otherwise be prevented.[10]

This Note aims to build upon the existing literature outlining the need for a right to counsel in eviction proceedings. It argues that a substantive due process fundamental rights approach might provide a strong basis for asserting a right to counsel under the U.S. Constitution. Part I briefly introduces the current state of the U.S. eviction system and explores arguments supporting a constitutional right to counsel in eviction proceedings. There is a body of literature which discusses the potential for a right to counsel under a "civil *Gideon*" procedural due process framework.[11] However, comparatively little has been written about how such a right might be found under a substantive due process framework.[12] Part II addresses the disproportionate burdens borne by uncounseled tenants in eviction proceedings and why a right to counsel may be able to address them. It also considers how legislative efforts in New York City bolster the case for providing a right to counsel. Finally, Part III applies a substantive due process framework. It argues that while scholars have often focused on *procedural* due process as the basis for finding a right to counsel in evictions, the Supreme Court's *substantive* due process jurisprudence—as demonstrated in *Washington v. Glucksberg* and *Obergefell v. Hodges*—might offer an

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cc/3K25-6ZZP] (reporting on the COVID-19 housing crisis through aggregating existing research).

9. Matthew Desmond, Opinion, *Tipping the Scales in Housing Court*, N.Y. TIMES (Nov. 29, 2012) [hereinafter Desmond, *Tipping the Scales*], https://www.nytimes.com/2012/11/30/opinion/tipping-the-scales-in-housing-court.html [https://perma.cc/Y9S2-L4TD].

10. *Id*.

11. This literature builds on the Supreme Court's decision to recognize a right to counsel in a criminal prosecution. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

12. Rachel Kleinman, for example, addresses this argument, but states that "[i]t is unlikely that the right to counsel in civil cases would be considered fundamental." Rachel Kleinman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1510 (2004) [hereinafter Kleinman, *Housing Gideon*]. However, in 1999, Leonard Schroeter did attempt to set forth a possible substantive due process framework to find this right to counsel. *See generally* Leonard W. Schroeter, *Civil* Gideon*: If Not Why Not?*, ATJ JURIS. (1999) (discussing potential support for right to counsel under *Gideon* in civil proceedings).

alternative pathway for finding this right.[13] It argues that a test case should be brought in the courts asserting a federal constitutional remedy under the substantive component of the Due Process Clause of the Fourteenth Amendment.

I. The Existing Frameworks: Eviction in the United States and the State of Constitutional Due Process

Eviction has long been a mechanism through which landlords have sought to legally vindicate their rights to compensation.[14] Part I.A. will discuss the historical underpinnings of the modern eviction process in the United States. Historical solutions to the problem will be addressed in Part I.B., with a particular focus on the potential constitutional due process doctrines that might support a right to counsel in eviction proceedings.

A. Eviction in the United States: Journey to the Present Day

In feudal times, eviction law developed within the English common law as a quasi-combination of personal and real property law whereby a landlord conveyed his property to a tenant in exchange for the tenant's rent.[15] A tenant's obligation to pay rent was unconditional; neither rat nor roach, famine nor departure excused a tenant from his obligation to pay rent.[16]

As the English common law made its way to the United States, this system largely remained intact, offering little protection to tenants.[17] Over time, states began to pass legislation and develop doctrinal frameworks to supplement the existing landlord-tenant common law.[18] The level of protection offered to tenants by these laws varied. For instance, statutes might give force to lease provisions ensuring a landlord's ability to terminate

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13. Washington v. Glucksberg, 521 U.S. 702 (1997); Obergefell v. Hodges, 576 U.S. 644 (2015).

14. *See* Breezy A. Schmidt, *North Dakota Case Study: The Eviction Mill's Fast Track to Homelessness*, 92 N.D. L. REV. 595, 600 (2017).

15. *Id.* at 600.

16. *Id.*; *see* Christopher W. Sullivan, *Forgotten Lessons from the Common Law, the Uniform Residential Landlord and Tenant Act, and the Holdover Tenant*, 84 WASH. U. L. REV. 1287, 1291 n.25 (2006) (discussing conceptions of property rights and responsibilities under English feudalism).

17. Schmidt, *supra* note 14, at 602–03 ("[After American independence from Britain,] states and territories largely adopted English common law.").

18. *Id.*; *see* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 504 (1982) (describing the development of landlord-tenant law from notions of contract during the 1800s to modern residential and commercial landlord-tenant law).

a lease upon a tenant's default in rent payments or any other obligations of the lease.[19] Or they might bless "summary process" proceedings—establishing expedited judicial processes through which a landlord could forego the expensive and resource-intensive action of ejectment and, instead, forcibly remove a tenant more easily than through an ordinary civil proceeding.[20] Indeed, these summary process statutes remain in effect in much of the United States and form the basis for many of the difficulties tenants face when navigating eviction proceedings—particularly when they lack representation by counsel.[21] At the same time, statutes and doctrines arose in protection of certain tenants' rights. For example, the doctrine of constructive eviction developed during this time. Through this doctrine, tenants "were permitted to treat their leases as terminated, not merely to treat the rent as suspended," when a landlord's practices materially deprived a tenant of the enjoyment of his lease.[22] Courts also began giving greater force to landlords' contractual lease obligations.[23]

During the 1960s and 1970s, the landscape of landlord-tenant law in the United States underwent a significant transformation, bringing it "into closer harmony with modern principles of contract, tort, civil procedure and commercial law."[24] Federal action served as a primary catalyst behind these changes via the Housing Acts of 1949 and 1954, the Fair Housing Act of 1968, and the housing codes these Acts spurred state and local governments to

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19. Glendon, *supra* note 18, at 512.

20. Scholars have noted that summary process statutes, inasmuch as they prevented self-help evictions in which landlords forcibly removed tenants from property, likely benefited tenants. However, they primarily worked in landlords' interests due to the cost savings and the sheer rapidity of the proceedings, which prevented (and continue to prevent) tenants from adequately mounting defenses. *See id*. at 512; *see also* Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 570 n.55 (1988) [hereinafter Scherer, *Gideon's Shelter*] ("New York's current summary eviction proceeding statute . . . has its origins in a statute passed in 1820 to give landlords a 'simple, expeditious and inexpensive means of regulating possession of their premises.'" (quoting Reich v. Cochran, 201 N.Y. 450, 454 (1911))).

21. *See infra* Part II; *see also* Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135 (2000) [hereinafter Spector, *Tenant's Rights*] (discussing the procedural difficulties summary eviction proceedings pose to tenants).

22. Glendon, *supra* note 18, at 513.

23. *Id.* at 518.

24. *Id.* at 503–04 ("It is generally acknowledged that the 1960's and 1970's saw a revolution of sorts in American landlord-tenant law."); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 542 (1984) (acknowledging that the 1960's and 1970's were marked by significant changes in housing costs and rent-to-income ratios).

enact.[25] Scholars describe how, as states began to pass state-wide housing codes, the law shifted in tenants' favor on two fronts. First, "[l]egislation establishing new obligations for landlords and new rights and remedies for tenants also began to appear at the state level."[26] Second, state and local legislation also seemed to spark courts to more aggressively define the rights of tenants, particularly vis-à-vis contract and tort law.[27] These scholars describe how this rapid period of change largely tracked with greater social unrest in the 1960s and ultimately had the effect of weakening the once-common presumption of *caveat emptor*—buyer beware—in the relations between tenants and landlords.[28]

The legal relationship between landlords and tenants also changed in another significant way during this time: states and localities throughout the country began to establish housing courts to adjudicate disputes between landlords and tenants. The first city in the United States to establish a housing court was Boston in 1971.[29] New York City soon followed in 1972 through an act of the state legislature. The legislation stated the purpose of these courts was the "effective enforcement of state and local laws for the establishment and maintenance of proper housing standards . . . essential to the health, safety, welfare, and reasonable comfort of the citizens of the state."[30] The housing court was meant to consolidate the jurisdictions held separately and exclusively by civil and criminal courts, which often made legal proceedings between landlords and tenants prohibitively difficult and expensive.[31] Soon, jurisdictions across the country began to follow suit—

25. 42 U.S.C. §§ 3601–19.

26. Glendon, *supra* note 18, at 519.

27. Rabin, *supra* note 24, at 552.

28. The "primary factor" contributing to the "revolution" in landlord-tenant law "was the civil rights movement of the sixties, the turbulence of which impelled judges and legislatures to do 'something' about poor housing conditions in the slums. The federal government responded to those societal forces with the Fair Housing Act of 1968 and the Housing and Urban Development Act of 1968." *See id.* at 554; *see also, e.g.*, Pines v. Perssion, 14 Wis. 2d 590, 596 (1961) (rejecting the "obnoxious legal cliché, *caveat emptor*").

29. Paul G. Garrity, *The Boston Housing Court: An Encouraging Response to Complex Issues*, 17 URB. L. ANN. 15, 17 (1979); *see Housing Brass Tacks: Housing Court*, URB. OMNIBUS (Feb 7, 2018), https://urbanomnibus.net/2018/02/housing-court/ [https://perma.cc/83BN-M5MC] ("The civil rights movement prompted cities to create dedicated housing courts. Boston went first, establishing its housing court in 1971.").

30. 1972 N.Y. Laws ch. 982 § 1(a); *see* Leonard N. Cohen, *The New York City Housing Court—An Evaluation*, 17 URB. L. ANN. 27, 27 (1979) (describing the 1971 law as fundamentally changing legal enforcement of housing laws and standards).

31. Cohen, *supra* note 30, at 28 ("[Before the 1972 Act], the civil court exercised exclusive city-wide jurisdiction over summary proceedings to evict tenants for non-payment of rent, or as holdovers for a breach of the landlord-tenant relationship . . . . [but] were powerless to enforce housing maintenance codes.").

establishing dedicated housing courts to adjudicate landlord-tenant disputes.[32]

Unfortunately, the spirit undergirding the establishment of these courts has not prevailed. In the contemporary United States, eviction proceedings that ostensibly serve to provide remedies and fairly adjudicate landlord-tenant disputes place tenants at a precarious disadvantage. Indeed, as Matthew Desmond, principal investigator at Princeton's Eviction Lab, puts it: "On one side of the room sit the tenants: men in work uniforms, mothers with children in secondhand coats . . . [while] [o]n the other side . . . are not the landlords but their lawyers . . . joking with the bailiff as they casually wait for their cases to be called."[33] Across the United States, an overwhelming majority of tenants facing eviction in housing courts are systematically disadvantaged by a lack of legal representation, while their opponent-landlords are most often represented.[34] Part I.B. will consider the arguments for finding a constitutional right to counsel in eviction proceedings to prevent the imbalances caused by this skewed access to counsel.

B. Constitutional Due Process and the Right to Counsel in Eviction Proceedings

This Note is not the first scholarly work to argue for a constitutional right to counsel for low-income individuals having their rights adjudicated. In 1963, the Supreme Court decided *Gideon v. Wainwright*, holding that the Sixth Amendment's guarantee of counsel to an accused defendant applies to state criminal prosecutions.[35] Since then, numerous scholars have contributed to a "civil *Gideon*" movement[36]—arguing that the same logic underlying the guarantee of counsel to criminal defendants applies to indigent litigants in various civil proceedings.[37] This movement has extended

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32. *Id.*

33. Desmond, *Tipping the Scales*, *supra* note 9.

34. *See id.* ("In many housing courts around the country, 90 percent of landlords are represented by attorneys and 90 percent of tenants are not. This imbalance of power is as unfair as the solution is clear.").

35. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

36. *See, e.g.*, Risa E. Kaufman et al., *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772 (2014) (arguing that a "civil *Gideon*" framework enjoys strong theoretical and legal support because the same rationales that undergird the need for defendants to have counsel in criminal proceedings apply in many civil settings); Earl Johnson Jr., *50 Years of* Gideon, *47 Years Working Towards a "Civil* Gideon*,"* 47 CLEARINGHOUSE REV. 47, 48 (2013) (noting that litigants are facing an adversarial system whose integrity relies on their being represented by counsel).

37. It has been argued that counsel is warranted in many different civil proceedings that adjudicate various rights, such as housing cases, family law cases, small claims cases,

to the eviction context, as lawyers and scholars alike have sought to draw attention to the weighty interests at stake in eviction proceedings.[38] This sub-part considers two doctrinal frameworks that might support a constitutional right to counsel for evicted tenants—both stemming from the Due Process Clause of the Fourteenth Amendment. The first is procedural due process which has earned the bulk of scholarly analysis to this end, and the second is substantive due process, the central focus of this Note.

1. Procedural Due Process

As judges and scholars have often been keen to point out when discussing the Fifth and Fourteenth Amendments, "[w]hat are generally referred to as the 'Due Process' Clauses sure seem to be primarily about *process*."[39] Indeed, the traditional procedural formulation of due process vis-à-vis these clauses finds early support in the Supreme Court's jurisprudence.[40] This procedural formulation of the Due Process Clause—procedural due process, as it were—focuses on the *means and processes* by which an adjudicatory outcome is resolved rather than the outcome itself.[41] It has been discussed as "the most compelling argument for recognizing a right to counsel for tenants faced with eviction" because "as a matter of due process of law, a tenant should not have to defend a legal proceeding that can result in the loss of his home without the availability of counsel."[42]

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social security disability appeals, unemployment cases, immigration cases, and others. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010) [hereinafter Engler, *Connecting Self-Representation*].

38. *See* Scherer, *Gideon's Shelter*, *supra* note 20, at 564–69.

39. Evan D. Bernick, *Substantive Due Process for Justice Thomas*, 26 GEO. MASON L. REV. 1087, 1096 (2019); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 36 (1991) (Scalia, J. concurring) (criticizing Supreme Court decisions employing the Due Process Clause's protections to strike down legislation on the basis of substance, rather than procedural fairness); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 254 (2014) (asserting a procedural formulation of due process that requires following traditional procedural procedures in accordance with the law).

40. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276–77 (1855) ("[Due process is] examin[ing] the constitution itself, to see whether this process be in conflict with any of its provisions."); Hurtado v. California, 110 U.S. 516, 536 (1884) ("If any of these [fundamental rights] are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by due process of law.") (internal quotations omitted).

41. Bernick, *supra* note 39, at 1096; *see* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 469–70 (1986) (discussing the historical approach of the Supreme Court in determining the due process mandated by the Fourteenth Amendment).

42. Scherer, *Gideon's Shelter*, *supra* note 20, at 562.

In his seminal article advocating for a constitutional right to counsel for indigent tenants facing eviction in housing courts, Andrew Scherer, a prominent access-to-justice scholar, argues that the Supreme Court's procedural due process jurisprudence casts doubt on the constitutionality of not providing tenant-litigants with counsel. His arguments-in-chief are two-fold: First and foremost, that the three-part balancing test set forth by the Supreme Court in *Mathews v. Eldridge*[43] compels the appointment of counsel to meet constitutional due process requirements;[44] and second, that counsel must be guaranteed to ensure meaningful access to the courts.[45]

Scherer first applies the three *Mathews* factors in lockstep to conclude that procedural due process requires the appointment of counsel to indigent tenants facing eviction. In *Mathews*, the Supreme Court considered a plaintiff's challenge to the procedures used by the U.S. Social Security Administration to terminate benefits, establishing a three-factor consideration to determine the type of constitutional due process owed to litigants facing such deprivations.[46] These factors require consideration of (1) the litigant's interests at stake; (2) the risk of erroneous deprivation of these interests through procedures used; and (3) the government's interest in the alternative procedures proposed.[47]

Applying this framework, Scherer points first to the weighty property and liberty interests at stake in eviction proceedings. He argues that "the right of a tenant to continued occupancy of his home is a traditionally recognized property right" such that tenants have significant property

43. Mathews v. Eldridge, 424 U.S. 319 (1976).

44. Scherer, *Gideon's Shelter*, *supra* note 20, at 562.

45. *Id.* at 579.

46. The *Mathews* Court determined that courts, in such cases, must consider the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. This balancing test has been applied by courts in case-by-case analyses to determine how best to afford litigants the due process they are guaranteed by the Constitution in proceedings. *See* Scherer, *Gideon's Shelter, supra* note 20, at 563; *see also* Kleinman, *Housing Gideon*, *supra* note 12, at 1512 (examining courts' use of the *Mathews* framework in right-to-counsel cases). Scherer argues that these interests are "enormous" and, as such, constitute the primary rationale under the *Mathews* framework for adopting a civil right to counsel in evictions. Scherer, *Gideon's Shelter*, *supra* note 20, at 564–66.

47 *Mathews*, 424 U.S. at 335.

interests at stake in eviction proceedings.[48] Additionally, he points to research available at the time of his writing highlighting the association between forced removal and from one's home and residual trauma as weighing into the property interest consideration.[49] Scherer's liberty interest argument, meanwhile, boils down to the severe risk of homelessness that eviction necessarily involves.[50] He determines that, given the "potentially devastating consequences of homelessness" resulting from an eviction, the constitutional procedural due process jurisprudence convincingly weighs in favor of the appointment of counsel, because an indigent litigant faces a high risk of being deprived of their physical liberty vis-à-vis their home.[51] Scherer leans on the Supreme Court's procedural due process right-to-counsel formulation in *Lassiter v. Department of Social Services*,[52] which provides in pertinent part, "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[53] This argument continues to rest on stable premises today. A 2001 study drawing on a national sample of homeless people, for instance, revealed that "nearly two out of five homeless persons who use homeless assistance programs came to be homeless via involuntary displacement."[54]

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48. Scherer, *Gideon's Shelter*, *supra* note 20, at 564 (citing Greene v. Lindsey, 456 U.S. 444, 450–51 (1982) (holding that plaintiff tenants who had eviction judgments placed against them in default had their due process right to continued residence in their homes violated)).

49. *Id.* This consideration—the importance of noting the connection between the property interest in continued occupancy of one's home and one's human wellbeing—has been documented extensively in recent years. *See* DESMOND, EVICTED, *supra* note 2, at 296. Mathew Desmond writes, "Residential stability begets a kind of psychological stability, which allows people to invest in their homes and social relationships . . . along with instability, eviction also causes loss." *Id.*; *see* Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 1, 2 (2015). These considerations also bleed over into the liberty interests at stake in eviction adjudications. Scherer quotes the Supreme Court to define as liberty "the right of the citizen . . . to use [his faculties] in all lawful ways, to live and work where he will; to earn his livelihood by any lawful calling; to pursue any lawful trade or vocation." Scherer, *Gideon's Shelter*, *supra* note 20, at 567 (quoting Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897)); *see also* Kleinman, *Housing Gideon*, *supra* note 12, at 1512 (discussing Scherer's treatment of *Allgeyer* in defining liberty interests).

50. Scherer, *Gideon's Shelter*, *supra* note 20, at 568; *see also* Schmidt, *supra* note 14, at 598 ("Eviction is a leading cause of poverty and homelessness. The eviction epidemic is disrupting the foundation of our society.").

51. Scherer, *Gideon's Shelter*, *supra* note 20, at 568.

52. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

53. *Id.* at 27 (as cited in Scherer, *Gideon's Shelter*, *supra* note 20, at 567–68).

54. Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem,* 14 HOUSING POL'Y DEBATE 461, 468–69 (2003). Similarly, a 2016 North Dakota study found that 36% of homeless adults had left their previous dwellings because they could not afford their rent and an additional 35% were evicted or not welcome back to their homes.

Thus, the risk of eviction continues to weigh on an affected tenant's liberty interests.

Next, Scherer emphasizes both the inherent risk of erroneous deprivation of rights created by eviction procedures, and the government's own interest in providing counsel to indigent eviction tenants. With regards to the former, under the second prong of the *Mathews* framework, Scherer argues that the risk of erroneous deprivation of rights is "inherent in the procedures used for eviction in all jurisdiction[s]," as tenants are subjected to unfamiliar and complex procedures.[55] Parties managing the procedural demands of an eviction proceeding must balance intricate legal requirements that include codes intended to protect tenants and legislation limiting landlord actions—mastery of which is "generally a prerequisite for either side to obtain a winning outcome."[56] Scherer also points to the Supreme Court's own recognition that the absence of counsel in difficult proceedings renders the right of a litigant to be heard effectively moot.[57] Thus, the consequences of appearing in eviction proceedings without counsel often disproportionately impacts tenants negatively.[58] As to the government's interest, the third *Mathews* prong, Scherer further notes that the government has few countervailing interests that outweigh the liberty interests at stake in eviction proceedings, as procedural protections exist within the judicial system for the very purpose of ensuring the fairness and accuracy of judicial determinations.[59] Furthermore, the government's fiscal interests are served by the provision of counsel in the long term, according to Scherer, because

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Schmidt, *supra* note 14, at 621 n.297 (citing WILDER RSCH., HOMELESSNESS IN FARGO, NORTH DAKOTA AND MOORHEAD, MINNESOTA: KEY FINDINGS FROM THE 2015 SURVEY OF PEOPLE EXPERIENCING HOMELESSNESS 12 (2016)). Workers who have faced evictions are also 15% more likely to be laid off afterwards than those who have not. *Id.* at 618.

55. Scherer, *Gideon's Shelter*, *supra* note 20, at 569. Parties managing the procedural demands of an eviction proceeding must balance intricate legal requirements that include codes intended to protect tenants and legislation limiting landlord actions—mastery of which is "generally a prerequisite for either side to obtain a winning outcome." Kleinman, *Housing Gideon*, *supra* note 12, at 1515. Scherer also points to the Supreme Court's own recognition that the absence of counsel in difficult proceedings renders the right of a litigant to be heard effectively moot. *See* Scherer, *Gideon's Shelter*, *supra* note 20, at 574 (citing Powell v. Alabama, 287 U.S. 45, 68–69 (1932)). Thus, the consequences of appearing in eviction proceedings without counsel often disproportionately negatively impact tenants. *See* Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L & POL'Y REV. 31, 35 (2013) [hereinafter Engler, Turner v. Rogers].

56. Kleinman, *Housing Gideon*, *supra* note 12, at 1515.

57. *See* Scherer, *Gideon's Shelter*, *supra* note 20, at 574 (citing Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

58. *See* Engler, *Turner v. Rogers*, *supra* note 55, at 35.

59. Scherer, *Gideon's Shelter*, *supra* note 20, at 576.

whatever costs are incurred by paying for counsel might be offset by the prevention of homelessness and augmented provision of social services when people are able to remain in their homes.[60]

Although Scherer posits that *Mathews* allows for a convincing procedural due process argument in favor of the right to counsel, scholars have noted that contravening constitutional obstacles have impaired the pursuit of a "civil *Gideon*"—including in the eviction context. In particular, the Supreme Court's decision in *Lassiter v. Department of Social Services*[61] has been widely considered "a terrible blow to the effort to achieve a broad right to counsel in civil cases under a federal due process framework."[62] In *Lassiter*, the Court denied a petitioner facing the termination of their parental rights the right to government-provided counsel, articulating the "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[63] That decision largely stunted momentum in the context of a civil right to counsel.[64] The Court's "ad hoc approach"[65] has resulted in an unpredictable case-by-case analysis, which subsequently thwarted advocacy efforts to achieve a universal procedural due process right to counsel in civil proceedings, including in eviction proceedings.[66]

Additionally, in recent years, the procedural due process quest for a right to eviction counsel has been shaken up to an extent by the Supreme

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60. *Id.* at 577–79.

61. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

62. Clare Pastore, *A Civil Right to Counsel: Closer to Reality*, 42 LOY. L.A. L. REV. 1065, 1078 (2009); *see also, e.g.*, Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. C.R. & C.L. 63, 85 (2020) [hereinafter Petersen, *Building a House for Gideon*] ("[T]he hope that a federal constitutional right to counsel in civil proceedings was on the horizon was dashed in 1981 when the U.S. Supreme Court affirmed a parental rights termination without counsel in *Lassiter* . . . ."); Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 36 LOY. U. CHI. L.J. 635, 638 (2005) ("Since 1981, the Court's opinion in *Lassiter* has served as a touchstone for every judicial consideration of the rights of access to the courts for poor people in civil cases."); Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 63 (2007) ("For those who thought this progression [the right to counsel] might cross over to the civil side of the courts, hopes were dashed another two decades later when the Court issued its decision in *Lassiter v. Department of Social Services*.").

63. *Lassiter*, 452 U.S. at 26–27. Scherer seeks to circumvent the presumption announced in *Lassiter* in the case of evictions by emphasizing that tenants in eviction proceedings *do*, in fact, face the deprivation of liberty–they are subject to homelessness. Scherer, *Gideon's Shelter*, *supra* note 20, at 568.

64. Petersen, *Building a House for Gideon*, *supra* note 62, at 86.

65. *Lassiter*, 452 U.S. at 35 (Blackmun, J., dissenting).

66. Petersen, *Building a House for Gideon*, *supra* note 62, at 86–87.

Court's *Turner v. Rogers* decision.[67] Applying the *Mathews* framework, the Court in *Turner* held that the Due Process Clause does not require that a litigant facing incarceration for civil contempt the right to counsel, though it admonished that courts must provide "alternative procedural safeguards."[68] Judge David J. Dreyer, judge of Marion Superior Court in Indianapolis, Indiana until 2020, notes that while "*Turner* seemed like a case that could finally bring a new morning for sleepy civil right-to-counsel advocates," it ultimately did not fundamentally change the landscape of the law.[69] Instead, it allowed for alternative procedures, which the Court deemed "fundamentally fair," to substitute for the fairest possible safeguard—the right to counsel.[70] Due to the *Lassiter* and *Turner* decisions, a procedural due process argument in favor of the right to counsel in eviction proceedings may face significant pushback, notwithstanding its apparent comport with *Mathews.*

2. Substantive Due Process

Although scholars and proponents have thus far focused on the Supreme Court's procedural due process frameworks to promote the civil right to counsel—otherwise referred to as the civil *Gideon* movement—in the eviction context and beyond, this Note proposes that such a right may alternatively be found through the Due Process Clause's substantive component. Indeed, since the 1960s, the Court has significantly reshaped the scope of substantive due process in defining the breadth of constitutionally-

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67. Turner v. Rogers, 564 U.S. 431 (2011).

68. *Id.* at 448. The Court wrote that these alternative safeguards must serve many of the same functions that the provision of counsel might—namely, "adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings." *Id.*; David J. Dreyer, *Déjà Vu All over Again:* Turner v. Rogers *and the Civil Right to Counsel*, 61 DRAKE L. REV. 639, 653 (2013) ("*Turner* settled on four alternative procedures that a trial court may provide, instead of appointing counsel . . . ."). The reaction to *Turner* as it pertains to a civil right to counsel has thus been mixed, as its focus on "fundamental fairness" concerns and procedural safeguards appears to identify that courts and jurisdictions should implement these safety mechanisms to make courts more open and accessible—thereby invigorating the "doctrine of meaningful access to the courts." *See* Engler, Turner v. Rogers, *supra* note 55, at 40; Dreyer, *supra* note 68, at 652 (describing the mixed reaction to *Turner* among advocates for a civil right to counsel and indicating that it might have some positive effects). As such, future litigants might very well argue, through this *Turner* articulation, that the right to counsel *is* the fair procedural requirement necessary for achieving meaningful access to the courts. Petersen, *Building a House for Gideon*, *supra* note 62, at 81. On the other hand, scholars have also argued *Turner* has served as a sort of *impediment* in various quests for a civil right to counsel. Dreyer, *supra* note 68, at 658–60.

69. Dreyer, *supra* note 68, at 652.

70. *Id.* at 653.

protected fundamental rights.[71] The doctrine—though often not based on text explicitly found within the Constitution—has come to form the basis for numerous rights that the Court has deemed fundamental and implicitly protected by the Constitution's guarantee of life, liberty, and property.

In 1965, the Court decided *Griswold v. Connecticut*, recognizing that married couples enjoyed a fundamental right to privacy which thereby invalidated laws banning contraceptives.[72] The decision brought back to the forefront certain notions of constitutional rights and guarantees that had largely sat dormant during the Court's thirty-year respite from substantive due process, and is thus "considered to be the modern-day progenitor of substantive due process."[73] The Court next moved notions of substantive due process and constitutional fundamental rights forward significantly in its landmark *Roe v. Wade* decision.[74] In holding that the Fourteenth

71. After repudiating the economic substantive due process formulation of the *Lochner* era in *West Coast Hotel v. Parrish*, the Court largely abandoned substantive due process in favor of deferential review of state and federal legislation for a number of years. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). The Court's famous "Footnote Four" in *United States v. Carolene Products Co.* appeared to revive heightened due process scrutiny of state action, suggesting, for instance, that laws restricting the political process or targeting "discrete and insular minorities" might be subject to heightened scrutiny. 304 U.S. 144, 152–53 n.4 (1938). It described that such actions would trigger a "narrower scope for operation of the presumption of constitutionality." *Id.* Nonetheless, "for thirty years after *Carolene Products*, substantive due process seemed to be dead," as the Court continued to show considerable deference to legislative judgment. JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 76 (2003); *see also* Michael W. McConnell, *Ways to Think About Unenumerated Rights*, 2013 U. ILL. L. REV. 1985, 1989 (2013) ("During the intervening three decades [between the end of the *Lochner* era and *Griswold*], substantive due process dropped out of the Court's constitutional toolbox, and was mentioned only disapprovingly."). But the 1960s saw revival of heightened judicial scrutiny of state action under substantive due process doctrines—and sparked doctrinal frameworks that have formed the basis for numerous decisions since. Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling* Obergefell *and* Glucksberg, 21 LEWIS & CLARK L. REV. 245, 255–56 (2017) [hereinafter Watson, *Reconciling* Obergefell *and* Glucksberg].

72. Justice Douglas's opinion for the Court described that such laws banning contraceptives concerned "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." Griswold v. Connecticut, 381 U.S. 479, 485 (1965). The Court explained that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484.

73. Watson, *Reconciling* Obergefell *and* Glucksberg, *supra* note 71, at 255–56; *cf.* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 148 (2015) [hereinafter Yoshino, *New Birth of Freedom*] (noting that while substantive due process was largely unused during this time period, the Court did decide some cases that recognized certain unenumerated rights) (citing Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Rochin v. California, 342 U.S. 165, 172–73 (1952)).

74. Roe v. Wade, 410 U.S. 113 (1973).

Amendment's guarantee of due process of liberty embraced a right to privacy that included a woman's right to obtain an abortion, the Court built on *Griswold*'s articulation of fundamental rights.[75] The Court held in *Roe* that the Constitution, despite not explicitly mentioning a particular right to privacy, "recognized that a right of personal privacy . . . does exist."[76] Moreover, it defined that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" would be guaranteed by constitutional due process.[77] Despite this statement—which ostensibly sought to cabin the scope of rights that might be considered "fundamental"—both critics and proponents of the decision have noted that *Roe* represented an aggressive effort by the Court to "[discern] 'new' rights in its substantive due process jurisprudence."[78] That is, the Court was said to have augmented the scope of rights that might be conceivably found through the Due Process Clause. As a result, scholars, and the Court itself, spent much of the next quarter-century after *Roe* debating the proper boundaries of fundamental rights under substantive due process.[79] The upshot of these cases ebbed and

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75. *Id.* at 152; *see also* Watson, *Reconciling* Obergefell *and* Glucksberg, *supra* note 71, at 256 ("Relying on *Griswold*, the Court in *Roe v. Wade* . . . held that the right of privacy, founded in in the Fourteenth Amendment's concept of liberty is 'broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'").

76. *Roe*, 410 U.S. at 152.

77. *Id.*; *see also id.* at 169 (Stewart, J., concurring) ("As Mr. Justice Harlan once wrote: 'The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This liberty is not a series of isolated points . . . .'").

78. Yoshino, *New Birth of Freedom*, *supra* note 73, at 152; *see also* Bernick, *supra* note 39, at 1095 ("[C]onservative originalists . . . condemn[ed] decisions celebrated by liberals in the 1960s and 1970s—*Roe v. Wade* in particular."); ROBERT H. BORK, THE TEMPTING OF AMERICA 43 (1990) ("Who says *Roe* must say *Lochner* . . . ."); Thomas Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 531 (2015) ("[I]t has been accepted wisdom in the conservative legal movement for the last several decades that 'judicial activism in the service of property and free enterprise'—that is, *Lochner*—and judicial activism in the service of privacy and reproductive autonomy—that is, *Griswold* and *Roe*—are equally pernicious.") (citations omitted).

79. In a major post-*Roe*, post-*Griswold* substantive due process case, for example, the Court in 1986 held that the Constitution did not protect a fundamental right to homosexual sodomy because fundamental liberties must be "'deeply rooted in this Nation's history and tradition' or 'implicit in our concept of ordered liberty'", at least suggesting that the finding of fundamental rights ought to be subject to a higher bar. Bowers v. Hardwick, 478 U.S. 186, 194 (1986). Indeed, the Court described that "against this background," the claim that a fundamental right to sodomy existed was "at best, facetious." *Id.* As a result, certain commentators foretold that *Bowers* would result in the death of substantive due process. *See* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 215 (1987) ("[T]he Court has called the evolution of [substantive due process] to a halt and, I believe, has rendered a decision that may portend the second death of substantive due process."). This focus on historical rooting took firm

flowed, whereby the Court seemed to vacillate between a more rigid, formulaic approach and a more open-ended, expansive approach to the scope of rights protected by substantive due process.[80]

Over the last twenty-five years, the Court appears to have articulated two overarching—and somewhat differing—approaches to substantive due process, both of which implicate the analysis for finding a fundamental right to counsel in eviction hearings. First, we consider *Washington v. Glucksberg*.[81] In 1997, the *Glucksberg* Court[82] significantly narrowed the scope of due process fundamental liberty rights and outlined what many have considered the modern standard for finding a fundamental right under the Due Process Clause.[83] In deciding that the substantive due process did not confer a right to physician-assisted suicide, the Court set forth a two-factor inquiry for finding a constitutional fundamental right—with the first factor focusing on tradition and the second on the level of specificity at which the right is

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hold in academic circles after *Bowers*. Professor Cass Sunstein dichotomized the Due Process and Equal Protection Clauses, arguing that "[f]rom its inception, the Due Process Clause has been interpreted . . . to protect traditional practices against short-run departures," while the Equal Protection Clause was intended more to "protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding." Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection,* 55 U. CHI. L. REV. 1161, 1163 (1988). But the Court's 1994 decision in *Planned Parenthood v. Casey* cast some doubt as to whether the Court would continue to affirm the *Bowers* requirement that fundamental rights be historically rooted in upholding the "central holding of *Roe*" based on the "explication of individual liberty we have given." Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 853 (1994); *see* Yoshino, *New Birth of Freedom*, *supra* note 73, at 149 (describing *Casey* as falling into the line of cases articulating the Court's more open-ended approach to unenumerated fundamental rights).

80. Yoshino, *New Birth of Freedom*, *supra* note 73, at 149.

81. Washington v. Glucksberg, 521 U.S. 702 (1997).

82. At issue in *Glucksberg* was whether the Due Process Clause encompassed a liberty interest "extend[ing] to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide." *Id.* at 708 (internal quotations omitted). The petitioners in the case challenged a Washington statute which outlawed assisted suicide, arguing that it violated constitutional due process rights and seeking rescission of the statute so as to receive treatment from their physicians. *Id.*; *see* Dave Rodkey, *Making Sense of* Obergefell: *A Suggested Uniform Substantive Due Process Standard*, 79 U. PITT. L. REV. 753, 756–57 (2018) ("The doctors felt they had a duty to administer the medication, but state laws prohibited them from doing so. Under the statute, 'promoting' a suicide was a felony, punishable by up to five years in prison.") (citations omitted).

83. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 702 (2015) (Roberts, C.J., dissenting) ("*Glucksberg* [is] the leading modern case setting the bounds of substantive due process."); Yoshino, *New Birth of Freedom*, *supra* note 73, at 150 (recognizing *Glucksberg* as a fundamentally different approach from the Court's prior fundamental rights jurisprudence).

defined.[84] According to the *Glucksberg* Court, a due process fundamental liberty right is one that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[85] Further, the Court required a "'careful description' of the asserted fundamental liberty interest,"[86] and mandated a specific—though not necessarily the narrowest possible—framing of the right.[87] The Court also seemed to indicate that it would be "more open to recognizing negative 'freedom from' rights than positive 'freedom to' rights," though it did not cement this factor as a firm requirement in fundamental rights analysis.[88] This formulation, according to scholars, constituted a significantly different approach to fundamental rights, consciously stepping away from the more expansive *Griswold-Roe-Casey* formulation in favor of an inquiry requiring rights to be "so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment."[89]

Nearly twenty years later in *Obergefell v. Hodges*, the Court once again took on the scope of substantive due process, this time inquiring whether the Due Process Clause conferred a fundamental right to same-sex marriage.[90] In answering that question in the affirmative, the Court evidently employed a more expansive approach to fundamental-rights analysis than in *Glucksberg*, leading commentators and critics to prognosticate that the case might fundamentally alter the future of substantive due process analysis.[91]

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84. *Glucksberg*, 521 U.S. at 721.

85. *Id.* (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); then quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

86. *Id.*

87. *See* Peter Nicolas, *Fundamental Rights in a Post-*Obergefell *World*, 27 YALE J.L. & FEMINISM 331, 335 (2016).

88. Yoshino, *New Birth of Freedom*, *supra* note 73, at 150. That the Court did not entrench the distinction between so-called "positive" and "negative" rights as a firm requirement in finding a fundamental right proves important to finding a substantive due process right to counsel in the eviction context. *See infra* Part III.B.

89. *Glucksberg*, 521 U.S. at 721 n.17 (citations omitted); *see* Watson, *Reconciling* Obergefell *and* Glucksberg, *supra* note 71, at 258 ("[T]he Supreme Court in *Glucksberg* . . . adopt[ed] instead the traditional approach to due process analysis and suggested by implication that *Roe* and *Casey* were aberrations in substantive due process analysis."). To see a brief discussion of *Casey*, refer to *supra* note 79.

90. Obergefell v. Hodges, 576 U.S. 644 (2015).

91. *See id.* at 702–03 (Roberts, C.J. dissenting) ("Perhaps recognizing how little support it can derive from precedent, the majority . . . jettison[s] the 'careful' approach to implied fundamental rights taken by this Court in *Glucksberg* . . . . requir[ing] it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process."); *see also* Rodkey, *supra* note 82, at 760–61(describing *Obergefell* as employing a broader notion of freedom in affirming a fundamental right to same-sex marriage than was defined in *Glucksberg*); Watson, *Reconciling* Obergefell *and* Glucksberg, *supra* note 71, at 247 (theorizing that *Obergefell* drew on both due process and equal

In his majority opinion, Justice Kennedy describes that although "history and tradition guide and discipline this inquiry . . . [they] do not set its outer boundaries." [92] In relying less on the historical roots of the asserted right at issue, this expansive approach instead placed great weight on the Court's role in exercising "reasoned judgment."[93] Indeed, it reflects an almost sociological analysis, using "broad principles" about marriage and societal injustice to ask whether there was sufficient justification for *not* finding a fundamental right to marriage for same-sex couples.[94]

Moreover, the Court seemingly challenged *Glucksberg*'s specificity requirement, opting for what NYU Law Professor Kenji Yoshino dubs a "common law methodology" that allows for a less circumscribed inquiry about the right at issue.[95] Yoshino contends that one might distinguish the analytical approaches in *Glucksberg* and *Obergefell* by considering whether the asserted fundamental right is subsumed by a broader, more encompassing right.[96] In *Glucksberg*, one is not hard-pressed to note that the

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protection concerns in recognizing a broader notion of fundamental rights than *Glucksberg*, which drew only on the former).

92. *Obergefell*, 576 U.S. at 664. This language appears to pose a significant divergence from the Court's approach in *Glucksberg*, where it cautioned that fundamental rights need to be firmly "rooted in our tradition, history, and practice." *Glucksberg*, 521 U.S. at 721 n.17. Justice Kennedy notes that "the identification and protection of fundamental rights . . . 'has not been reduced to any formula,'" instead identifying four "principles and traditions" that suggest the right to same-sex marriage was fundamental: the implications for individual autonomy; the unique support marriage provides to a two-person union; the importance of safeguarding children and families; and the importance of marriage in maintaining social order. *Obergefell*, 576 U.S. at 663–69.

93. *Obergefell*, 576 U.S. at 664 (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting)).

94. Watson, *Reconciling* Obergefell *and* Glucksberg, *supra* note 71, at 251.

95. Yoshino argues that this methodology is reminiscent of the Court's approach in *Lawrence v. Texas*, where the Court invalidated laws prohibiting homosexual sodomy in a decision considered an expansive application of substantive due process. Yoshino, *New Birth of Freedom*, *supra* note 73, at 169 (citing Lawrence v. Texas, 539 U.S. 558 (2003)). Justice Kennedy argues in his majority opinion that his analysis is in line with *Glucksberg*, noting that while the latter "did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices," that approach would be inappropriate in the same-sex marriage context since the Court had historically inquired about fundamental rights pertaining to marriage and intimacy more broadly. *Obergefell*, 576 U.S. at 671; *see also* Watson, *Reconciling* Obergefell *and* Glucksberg, *supra* note 71, at 252 ("The majority sidesteps [the specificity issue] by appearing to relegate *Glucksberg* to its facts.").

96. Yoshino, *New Birth of Freedom*, *supra* note 73, at 165 ("The distinction may be that in the context of physician-assisted suicide, there was no more general right that had been recognized—such as the 'right to commit suicide.' In contrast, in the context of marriage, the major cases . . .had all referenced a higher-level right, namely, the 'right to marry.'").

asserted right to physician-assisted suicide did not flow from a pre-existing "right to commit suicide;"[97] meanwhile, in *Obergefell*, the right to same-sex marriage flowed more naturally from a recognized right to marriage.[98] This, of course, is a hypothesis. The Court quite notably did not offer much explanation for altering its approach in *Obergefell* from the one it used in *Glucksberg*,[99] and as a result, scholars have debated and discussed the differing fundamental rights approaches in the two cases and when each approach might be more applicable.[100]

Notwithstanding the reasons for the differing fundamental rights analyses in *Glucksberg* and *Obergefell*, it appears that the Court has articulated two distinct lines of substantive due process doctrine in the last quarter century, typified by the two cases. Part III of this Note discusses the historical and constitutional underpinnings for finding a fundamental right to counsel for tenants in eviction proceedings—demonstrated by the property and liberty interests at stake, as well as by the important constitutional interest in meaningful access to the judicial system. It relies on the frameworks articulated by both *Glucksberg* and *Obergefell* in concluding that a test case should be brought asserting such a fundamental due process right.

II. Eviction in the United States Today: Uncounseled and in Crisis

A. On the Road to Eviction

In the United States, an eviction is filed every four minutes, each the symptom of a greater housing crisis.[101] Ericka Petersen, Teaching Fellow at

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97. *Id.*

98. *Id.*

99. *See Obergefell*, 576 U.S. at 702–03 (Roberts, C.J., dissenting).

100. *See, e.g.*, Watson, *Reconciling* Obergefell *and* Glucksberg, *supra* note 71, at 251 (employing a framework that differentiates between asserted fundamental rights that implicate equal protection interests and those that do not); Andrew J. Pecoraro, *Exploring the Boundaries of* Obergefell, 58 WM. & MARY L. REV. 2063, 2080–84 (2017) (asserting that *Obergefell* differs from *Glucksberg* in its focus on validating equality concerns of "vulnerable, and likely minority, groups" such that it weights dignity concerns more heavily than it focuses on tradition); Courtney Megan Cahill, Obergefell *and the New Reproduction*, 100 MINN. L. REV. HEADNOTES 1, 6 (2016) (employing the broad understanding of fundamental rights approach used in *Obergefell* in the "alternative reproduction" context); Nicolas, *supra* note 87 (identifying *Obergefell* as fundamentally violating the *Glucksberg* doctrine under the Due Process Clause but as falling directly within the scope of rights traditionally protected by the Equal Protection Clause).

101. Terry Gross, *First-Ever Evictions Database Shows: 'We're in the Middle of a Housing Crisis'*, NPR (Apr. 12, 2018), https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis [https://perma.cc/TX94-WD5T].

Georgetown Law, argues that "the right to counsel in evictions is a critical piece of the solution" to the "dire consequences of inadequate housing" and eviction crisis.[102] Yet, the process that ultimately leads to the filing of an eviction claim begins well before a claim is brought to the courts. This crisis is brought on by at least three overlapping factors, discussed below, which point to an overwhelming conclusion: Tenants face significant risk of displacement because safe and decent housing in the United States is a scarce commodity.[103] This displacement often—though, importantly, not always—manifests through the eviction process.

The first factor is the sheer unavailability of affordable housing to poor tenants. This unavailability is a tragic downstream effect of a broader shortage in the American housing market as a whole. A combination of "slow recovery from the Great Recession, labor shortages, building and land costs . . . rising rent and utility costs, and stagnating incomes" has led to a shortage of seven million affordable rental homes for extremely low-income renters.[104] Combined with restrictive regulatory frameworks, such as single-family zoning laws that prevent apartment buildings and other multi-family dwellings from being built in cities across the country,[105] these factors result in a shortage of homes for those who need it. Simply stated, supply and demand for affordable housing are out of alignment, and those in the most desperate need of housing are at the greatest risk of not finding it.[106]

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102. Petersen, *Building a House for Gideon*, *supra* note 62, at 66.

103. *Id*. at 71; *see also* ANDREW AURAND ET AL., NAT'L LOW INCOME HOUS. COAL.: THE GAP: A SHORTAGE OF AFFORDABLE HOMES 6 (2019) (describing how both housing and financial instability negatively impact the health and wellbeing of low-income families).

104. Petersen, *Building a House for Gideon*, *supra* note 62, at 71; *see also* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, PROTECT TENANTS, PREVENT HOMELESSNESS 6 (Oct. 23, 2018), http://nlchp.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf [https://perma.cc/7JH3-8RWA] ("Because there are too few affordable units . . . too many low-income renters are forced to spend far more than they can afford to keep roofs over their heads."); *id.* ("Renter households that pay more than half of their total household income on housing are at a record high of over 21 million.").

105. *Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right*, Note, 135 HARV. L. REV. 1104, 1106 (2022) ("Restrictive zoning rules, like single-family zoning, reduce the supply of land available for new housing, which in turn inflates the cost of new housing projects."); Richard D. Kahlenberg, *Minneapolis Saw That NIMBYism Has Victims*, ATLANTIC (Oct. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/10/how-minneapolis-defeated-nimbyism/600601/, [https://perma.cc/G57E-S6TP], ("Single-family zoning not only segregates people by race and class, but also artificially increases prices and hurts the environment.").

106. Petersen, *Building a House for Gideon*, *supra* note 62, at 71–72 (describing that, with only 33 physically adequate and available units for every 100 low-income tenants, tenants who have just enough means to afford inexpensive housing face steep competition from similarly situated renters).

The second factor is the relative dearth of subsidized housing exacerbates the already scarce market for affordable housing.[107] The two biggest and well-known housing assistance programs—the Housing Choice Voucher Program ("Section 8 housing") and public housing—house only 2.2 and 1.2 million households, respectively.[108] This means that while these public programs were intended to create a baseline level of stability in the housing marketplace to combat market volatility, a large portion of eligible renters are unable to find housing through them. The programs have been famously underfunded in recent years,[109] resulting in only one in four eligible households receiving some form of federal-government-funded housing assistance even as need has increased.[110] Renters who seek out government-subsidized housing thus face tremendous barriers.[111] Furthermore, even those applicants who do receive housing assistance face challenges in the

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107. *See id*.; DEP'T OF HOUS. & URB. DEV., WORST CASE HOUSING NEEDS 2017 REPORT TO CONGRESS 20 (2017).

108. Petersen, *Building a House for Gideon*, *supra* note 62, at 72; *see also* DESMOND, EVICTED, *supra* note 2, at 302 ("Public initiatives that provide low-income families with decent housing they can afford are among the most meaningful and effective anti-poverty programs in America . . . . [E]very year rental assistance programs lift roughly 2.8 million people out of poverty.").

109. *See, e.g.*, Glenn Thrush, *An Affordable Housing Crisis Grows, HUD Sits on the Sidelines*, N.Y. TIMES (July 27, 2018), https://www.nytimes.com/2018/07/27/us/politics/hud-affordable-housing-crisis.html [https://perma.cc/FKK5-P5U8] ("This year, the White House proposed to slash $8.8 billion from . . . . housing programs."); Douglas Rice & Lissette Flores, *Congress Should Add Funding to Prevent 2018 Housing Voucher Cuts*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 27, 2017), https://www.cbpp.org/research/housing/congress-should-add-funding-to-prevent-2018-housing-voucher-cuts [https://perma.cc/5Z47-W9KX] ("The Senate and House fiscal year 2018 funding bills . . . would cut the number of Housing Choice Vouchers (HCV) [in 2018] by 30,000 and 110,000, respectively . . . leaving many low-income seniors, people with disabilities, and families with children without needed help to afford housing."); CORIANNE PAYTON SCALLY ET AL., URB. INST., THE CASE FOR MORE, NOT LESS: SHORTFALLS IN FEDERAL HOUSING ASSISTANCE AND GAPS IN EVIDENCE FOR PROPOSED POLICY CHANGES, at v (2018), https://www.urban.org/sites/default/files/publication/95616/case_for_more_not_less.pdf [https://perma.cc/36JD-RU6Z] ("Recent proposals, including the recently enacted Tax Cuts and Jobs Act, the administration's proposed fiscal year 2018 budget, and Speaker of the House Paul Ryan's A Better Way plan, threaten deep cuts and significant changes to housing assistance.").

110. Petersen, *Building a House for Gideon*, *supra* note 62, at 72.

111. A tenant in pursuit of public housing might, for example, "wait two to three years until the List unfr[eezes] [and] then wait another two to five years until her application ma[kes] it to the top of the pile" before hoping that the agent reviewing the file approves them, notwithstanding potentially troublesome renting histories. DESMOND, EVICTED, *supra* note 2, at 59; *see also* Petersen, *Building a House for Gideon*, *supra* note 62, at 73 ("In some larger metro areas, it can take decades to get off the list, and in others the waitlists are simply closed.").

form of landlord discrimination and potentially burdensome regulations that may threaten their ability to maintain sustainable affordable housing.[112]

Finally, available housing stock in the United States is in such poor condition that it increases eviction rates. These poor conditions mean that tenants often live in homes with "substandard or even life-threatening conditions. . . . includ[ing] structural deficiencies, pest and vermin infestations, broken appliances, mold, lack of heat or water, broken plumbing, and indoor hazards such as lead."[113] Such conditions often spur tenants to complain to their landlords, in the hopes of taking advantage of housing code protections.[114] But, as Petersen notes, landlords are frequently better off simply evicting and replacing those who complain instead of investing in repairs.[115] And even when this retaliatory behavior is against the law, the law is sparingly enforced, emboldening landlords to continue these evictions.[116] Thus, the already-small market for available affordable housing is even smaller than it appears because so many of these homes are uninhabitable.[117]

Altogether, these factors have resulted in an affordable housing crisis that makes tenants significantly more likely to face displacement. Tenants in low-income localities around the country particularly face both the threat of displacement and actual displacement from their homes—among the leading causes of housing insecurity in the United States.[118] Furthermore, numbers often do not even capture the true extent of displacement, as countless families and individuals are forced to move from their homes by the threat of eviction, even if a formal proceeding is not instigated.[119] The focus of this Note, however, remains on those tenants who

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112. Petersen, *Building a House for Gideon*, *supra* note 62, at 73.

113. *Id*. at 74.

114. *Id.* at 70, 74 n. 85.

115. *Id.* at 74–75.

116. *Id.*

117. *Id*.

118. *Id.* Where "displacement" refers to tenants being forced to move from their homes and physically relocating themselves and their belongings, "housing insecurity" refers to a broader phenomenon. The Urban Institute notes, "[h]ousing insecurity can take a number of forms: homelessness, housing cost burden; residential instability; evictions and other forced moves; living with family or friends to share housing costs (doubling-up); overcrowding; living in substandard, poor quality housing; or living in neighborhoods that are unsafe and lack access to transportation, jobs, quality schools, and other critical amenities." Josh Leopold, et al., *Improving Measures of Housing Insecurity*, URB. INST. (Nov. 2016), https://www.urban.org/sites/default/files/publication/101608/improving_measures_of_housing_insecurity.pdf [https://perma.cc/3Y24-NZT4].

119. Andrew Flowers, *How We Undercounted Evictions by Asking the Wrong Questions*, FIVETHIRTYEIGHT (Sept. 15, 2016), https://fivethirtyeight.com/features/how-we-undercounted-evictions-by-asking-the-wrong-questions/ [https://perma.cc/GN9T-

do encounter the formal process. Indeed, every year, millions of American tenants facing eviction who make their way through the housing courts endure structural and strategic disadvantages due to a lack of counsel.

Before detailing the effects of eviction processes on tenants in the United States, it is critical to briefly describe the effects the COVID-19 pandemic has had on the state of eviction. Since March 2020, the pandemic has further exacerbated the American housing crisis, and eviction has been exposed as a significant roadblock to enacting public health measures. At the onset of COVID-19, recognizing the potentially disastrous public health effects evictions could have vis-à-vis coronavirus spread and thrusting evicted tenants into unsafe conditions, advocates lobbied federal and state governments to implement eviction moratoria and permit tenants who might otherwise be evicted to stay in their homes.[120] In response, Congress passed the CARES Act,[121] which "provided a 120-day moratorium on eviction filings as well as other protections for tenants in certain rental properties with Federal assistance or federally related financing."[122] Similarly, states across the United States passed moratoria under state law to protect tenants from eviction.[123] The goal of these protections was to "alleviate the public

J7ES] (describing that while formal evictions—when sheriffs forcibly remove tenants and their belongings from their homes—make up only 24% of all forced moves, informal forced moves are twice as common at 48%).

120. *See* Alayna Calabro, *Eviction Protections during the COVID-19 Pandemic*, NAT'L LOW INCOME HOUS. COAL. 9-2 (2022), https://nlihc.org/sites/default/files/2022-03/2022AG_09-01_Eviction-Protections-During-the-COVID-19-Pandemic.pdf [https://perma.cc/8P8X-EVU6] ("Advocates urged Congress and federal agencies to enact a national, uniform moratorium on eviction and foreclosures for nonpayment of rent that would provide broader protections for renters and homeowners."); Caroline Spivack, *New York Halts Evictions Due to Coronavirus Outbreak*, CURBED (Mar. 20, 2020), https://ny.curbed.com/2020/3/16/21180842/coronavirus-new-york-state-eviction-moratorium (last visited Apr. 16, 2022) ("The move to halt housing removals came after tenant advocates and elected officials decried the state's lack of a moratorium, arguing that evictions during this public health crisis would drive up homelessness and worsen the spread of COVID-19.").

121. Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281.

122. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,294 (Sept. 4, 2020).

123. *See, e.g.*, Spivack, *supra* note 120 (describing New York State's eviction moratorium in March 2020); Mihir Zaveri, *New York's Ban on Evictions Is Expiring. What Happens Now?*, N.Y. TIMES (Jan 14, 2022), https://www.nytimes.com/2022/01/14/nyregion/eviction-moratorium-new-york.html [https://perma.cc/2PV8-ETBC] ("For most of the pandemic, New York State has maintained a strict eviction moratorium . . . ."); Ann O'Connell, *Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus*, NOLO (April 4, 2022), https://www.nolo.com/evictions-ban [https://perma.cc/2BLT-ZZJU] (listing all states that, in various forms, implemented COVID-19-related eviction moratoria).

health consequences of tenant displacement during the COVID-19 pandemic."[124] In keeping with these goals, after the 120-day window expired, the Centers for Disease Control and Prevention ("CDC") acted within its statutorily-delegated powers to continue the federal eviction moratorium "to prevent the further spread of COVID-19."[125] The CDC then continued maintaining and renewing the federal moratorium to prevent tenants from facing elevated health risks from eviction through 2020 and most of 2021.[126]

Experts have credited these moratoria with having had a significant effect on mitigating virus spread, thereby helping to preserve public health during the pandemic.[127] Indeed, they have commented that moratoria at all levels of government have helped "avert illness and deaths due to COVID-19."[128] However, as of April 2022, the CDC's federal moratorium is no longer in place—having been struck down by the Supreme Court in August 2021[129]—and many states' moratoria have either expired or are set to do so.[130] The expiration of these federal and state eviction moratoria has largely

124. Temporary Halt in Residential Evictions, *supra* note 122, at 55,294.

125. *Id.*

126. Adam Liptak & Glenn Thrush, *Supreme Court Ends Biden's Eviction Moratorium*, N.Y. TIMES (Aug. 26, 2021), https://www.nytimes.com/2021/08/26/us/eviction-moratorium-ends.html [https://perma.cc/58VH-NNH5] ("Congress declared a moratorium on evictions at the beginning of the coronavirus pandemic, but it lapsed in July 2020. The C.D.C. then issued a series of its own moratoriums, saying that they were justified by the need to address the pandemic . . . .").

127. *See* Anjalika Nande et al., *The Effect of Eviction Moratoria on the Transmission of SARS-CoV-2*, NATURE (April 15, 2021), https://www.nature.com/articles/s41467-021-22521-5 [https://perma.cc/HU5N-PYFA] (modeling that from March to December 2020, federal, state, and local eviction moratoria prevented excess coronavirus cases to the tune of approximately 1,000 to 10,000 cases per million residents in low-eviction-rate areas and up to 100,000 cases per million residents in high-eviction-rate localities).

128. Kathryn M. Leifheit, et al., *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality*, 190 AM. J. EPIDEMIOLOGY 2563, 2568 (2021).

129. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 141 S. Ct. 2320, 2320 (2021).

130. *See, e.g.*, James Barron, *New York's Eviction Moratorium Is Ending*, N.Y. TIMES (Jan. 14, 2022), https://www.nytimes.com/2022/01/14/nyregion/eviction-moratorium-is-ending.html [https://perma.cc/8G6G-8HM7] (describing New York State's eviction moratorium expiring in January 2022); Maggie Mancini, *New Jersey's Eviction Moratorium Expires Saturday Amid Latest COVID-19 Surge*, PHILLY VOICE (Dec. 31, 2021), https://www.phillyvoice.com/new-jersey-eviction-moratorium-expire-2022-rental-assistance/ [https://perma.cc/3J3Y-GWCP] (reporting on New Jersey's eviction moratorium expiring at the end of December 2021); Madeline Kenney, *Illinois' Eviction Moratorium Ends Sunday*, CHICAGO SUN-TIMES (Oct. 3, 2021), https://chicago.suntimes.com/metro-state/2021/10/3/22707959/illinois-eviction-moratorium-ends-sunday [https://perma.cc/V9KA-MDFX] (reporting on Illinois' eviction moratorium expiring in October 2021). Not all state eviction moratoria have expired. California, for instance, has renewed its state moratorium, but it is also set to expire on June 10, 2022. Louis Hansen,

bolstered experts' convictions that reduced eviction has mitigated COVID-19's harm. Indeed, having studied these benefits and noting that "[t]he expiration of eviction moratoriums was associated with increased COVID-19 incidence and mortality in US states," some have urged governments to keep them in place.[131] Such a reversal does not seem likely though. Thus, in the absence of government policy halting tenant displacement from their homes during a global health crisis, longer term solutions are necessary to protect tenants' rights when they face eviction proceedings. The remainder of this Note considers the processes that tenants ordinarily navigate in the absence of temporary pandemic measures. It argues that a right to counsel in eviction proceedings can fundamentally change the balance of power in American housing courts and ensure that tenants are not arbitrarily and improperly evicted from their homes.

B. Once in Court: Summary Eviction Procedures in Housing Court

Although many of the shifts in the legal landscape in the 1960s and 70s intended to bridge long-lasting power disparities between landlords and tenants,[132] the housing courts created to combat these disparities have actually fostered endemic disadvantages of their own. Indeed, as Justice Douglas opined in 1967, "Default judgments in eviction proceedings are obtained in machinegun rapidity, since the indigent cannot afford counsel to defend."[133] Since the creation and popularization of summary eviction procedures across the United States, these procedures have become quick and reliable means for landlords to evict tenants from their homes.[134] Indeed, tenants who face displacement from their homes through the housing court eviction process are funneled through summary eviction procedures and

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California Passes New Extension on Eviction Ban, MERCURY NEWS (Mar. 31, 2022), https://www.mercurynews.com/2022/03/31/california-senate-endorses-extension-to-eviction-moratorium/ [https://perma.cc/SC4Q-ZBKX].

131. Leifheit, et al., *supra* note 128, at 2568.

132. *See supra* Part I.A.; *supra* notes 24–32 and accompanying text.

133. Williams v. Shaffer, 385 U.S. 1037, 1040 (1967) (Douglas, J., dissenting), *denying cert. to* 149 S.E.2d 668 (1966).

134. *See generally* Glendon, *supra* note 18, at 512 (describing the unique ways that summary eviction procedures make it easier for landlords to evict tenants). Note that while landlords are formally allowed to choose between the common law action in ejectment in an ordinary judicial proceeding, ejectment "has been discarded as a practical remedy although it is theoretically available," rendering summary procedures far more commonly used. Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 791 (1994) (internal quotations omitted).

oftentimes subject to hearings that last less than one minute.[135] The primary goal of summary procedures, according to scholars, is to deal with as many tenants in a day as possible through "devastatingly simple" processes.[136] This frequently results in tenants being evicted where they might not be were there firmer procedural safeguards in place. The following Section highlights two factors that contribute to excess tenant evictions in particular, both of which might be mitigated by counsel representation.

First, even though tenants facing eviction risk deprivation of their property interests and potential homelessness, very few get their day in housing court.[137] This causes tenants who might otherwise have legal recourse to be evicted by default judgment. The reasons for these absences are several-fold. Perhaps the simplest is lack of notice: tenants are sometimes not notified at all—or not notified properly—about impending eviction proceedings despite express mandates requiring legally sufficient notice.[138]

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135. Petersen, *Building a House for Gideon*, *supra* note 62, at 76; WILLIAM E. MORRIS INST. FOR JUSTICE, INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS 13 (2020) [hereinafter MORRIS, INJUSTICE IN NO TIME], https://www.morrisinstituteforjustice.org/helpful-information/landlord-and-tenant/47-institute-maricopa-county-justice-courts-eviction-report-5-21-2020/file [https://perma.cc/YW4A-VT37]. This empirical study of an eviction proceedings in Maricopa County, the county that encompasses Phoenix, Scottsdale, and Mesa, Arizona, reflects the national trend of very short eviction proceedings before the judge. *See* Anna Blackbourne-Rigsby & Nathan Hecht, Opinion, *It Should Take More Than 10 Minutes to Evict Someone*, N.Y. TIMES (Jan. 13, 2022), https://www.nytimes.com/2022/01/13/opinion/housing-eviction.html [https://perma.cc/FZ28-X2WW] ("While not every eviction can or should be avoid, each eviction case must be given the attention it deserves."). Anna Blackbourne-Rigsby is the Chief Judge of the D.C. Court of Appeals and Nathan Hecht is chief justice of the Supreme Court of Texas. *Id.*

136. *Id.*

137. *See* DESMOND, EVICTED, *supra* note 2, at 96 (noting that only approximately 30% of tenants due in Milwaukee housing court show up); MORRIS, INJUSTICE IN NO TIME, *supra* note 135, at 12–13 (finding that of 1097 cases observed, 848 tenants did not come to housing court, meaning only 23% of tenants came to court).

138. MORRIS, INJUSTICE IN NO TIME, *supra* note 135, at 33–34. Most landlord-tenant relationships are based on a lease and, in many states, are governed by the state versions of the Uniform Residential Landlord-Tenant Act, which requires written notice to the tenant, either by person or by certified mail. *Id.* at 8 (citing the Arizona Residential Landlord-Tenant Act); *see* Gerchick, *supra* note 134, at 811 ("Various local rent control ordinance provisions may provide additional grounds for or restrictions on unlawful detainer actions, such as requiring the landlord to have a 'just cause' for evicting the tenant."); *see also* AMELIA T.R. STARR ET AL., SUMMARY PROCEEDINGS IN NEW YORK'S TOWN AND VILLAGE COURTS: IDEAS FOR IMPROVEMENT, TASK FORCE TO EXPAND CIVIL LEGAL SERVICES 5 (Nov. 5, 2012), http://moderncourts.org/wp-content/uploads/2013/10/Summary-Proceedings-in-New-York-Town-and-Village-Justice-Courts-Ideas-for-Improvement.pdf [https://perma.cc/7BQB-UJUJ] ("[R]egularly observed in summary proceedings is the failure to provide respondents with adequate notice. Most problematic are cases in which

In a recent Maricopa County, Arizona study conducted from 2018 to 2019, for instance, the William E. Morris Institute found that "163 out of 240 (68%) of the summonses and complaints were served through post and mail," compared to 57% in 2005.[139] Moreover, the Institute reports that from their review of court files, they "observed many cases where although nothing was said on the record regarding the notice, [their] case file review revealed problems with the notice."[140] Some files contained no notice or improper information, and justices "rarely required landlords to provide evidence that the notice was proper."[141] Worse still, the Institute found five instances where the judge entered judgment for the landlord, despite the case file not containing any record of notice.[142] A 2018 New York City study similarly estimated that thousands of tenants each year were either not served or improperly served with notice of eviction hearings.[143] Even when tenants do receive proper notice of impending lease termination, in many cases, "not knowing or understanding their legal rights, [they] leave upon receiving a notice not legally sufficient to end their tenancy."[144] That is, many tenants view a notice to appear in court for an eviction proceeding as a notice of eviction in and of itself and decide to leave.[145] Tenants may also simply be "so confused and fearful of the legal system that going to court seems a worthless endeavor."[146] Such an attitude is not uncommon in the housing courts—particularly given that many tenants due to appear have already failed to prevent an eviction in the past.[147] Furthermore, the composition of people

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notice is not served at all . . . . However, more common . . . are cases in which a tenant receives informal 'notice' that falls short of the statutory requirements.") (footnote omitted).

139. MORRIS, INJUSTICE IN NO TIME, *supra* note 135, at 29.

140. *Id.* at 33.

141. *Id.*

142. *Id.* at 33–34.

143. The New York Times conducted an investigation in 2017 and 2018, finding numerous examples of improper service or no service at all, estimating that it contributed significantly to the City's 33,000 default judgments for failure to appear in court in 2017. They spoke to process servers who indicated that they had skirted service of process requirements to reach as many tenants as possible in a day—for example, by serving notice on six tenants in 12 minutes in a 44-stairwell, 536-apartment building even though "a process server should knock and wait several minutes, returning another day if no one answers, according to case law." Kim Barker et al., *The Eviction Machine Churning Through New York City*, N.Y. TIMES (May 20, 2018), https://www.nytimes.com/interactive/2018/05/20/nyregion/nyc-affordable-housing.html [https://perma.cc/4Z3V-JTSJ].

144. Petersen, *Building a House for Gideon*, *supra* note 62, at 76.

145. *Id.*

146. Gerchick, *supra* note 134, at 795.

147. *See* DESMOND, EVICTED, *supra* note 2, at 100 (describing Arleen's landlord's, Sherrena, routines and knowledge of best practices when seeking to evict tenants, having gone through the process as a landlord numerous times).

summoned to housing court makes them both less likely to show up and less likely to prevail in court if they do. Tenants in eviction proceedings are "a vulnerable group of litigants, typically poor, often women, and disproportionately racial and ethnic minorities," and they are likely to be heads of household.[148] Many tenants are thus frequently forced to choose between going to housing court and going to work—a decision with negative ramifications no matter the choice.[149] These factors taken together highlight the difficulties tenants face in accessing the courts even before they have a chance to attend their eviction proceedings.

Second, the procedural mechanisms employed in housing courts when tenants *are* present lend themselves to systematically biasing outcomes in favor of landlords. In every American state, statutes exist creating summary eviction procedures.[150] The existence of these procedures poses a threat to the due process rights of tenants because they are—as their name suggests—designed to proceed with a focus on haste, at the expense of fairness or accuracy.[151] In Maricopa County, for example, observers noted that the "average eviction call had approximately 50 cases scheduled for a hearing . . . in about one hour, but some evictions calls had as many as 150 cases scheduled . . . .[This] means that individual cases are set for approximately one minute each. "[152] This finding is by no means atypical, as housing courts throughout the country operate to funnel as many tenants through proceedings as quickly as possible.[153] The result is that tenants do

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148. Engler, *Connecting Self-Representation*, *supra* note 37, at 47; *see also* Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 393 (1995) ("Seventy percent [of tenants in New Haven housing courts] were members of racial or ethnic minorities, a significantly greater percentage than that of racial and ethnic minorities among all tenants households in New Haven.").

149. *See* DESMOND, EVICTED, *supra* note 2, at 96 ("Some tenants couldn't miss work or couldn't find childcare or were confused by the whole process or couldn't care less or would rather avoid the humiliation.").

150. Mary Spector, *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, 40 J. MARSHALL L. REV. 407, 410 (2007) [hereinafter Spector, *Tenant Stories*].

151. Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55, 80 (2018) [hereinafter Sabbeth, *Housing Defense*] ("[Eviction cases are] also called summary proceedings because of their shortened timeline compared to most civil litigation . . . ."); In North Dakota for instance, "tenants may be unable to provide the court a written response to a landlord's complaint" because the summary eviction process prevents them from petitioning for filing fee waivers. Schmidt, *supra* note 14, at 598.

152. MORRIS, INJUSTICE IN NO TIME, *supra* note 135, at 13.

153. In Chicago, a 2003 study found that hearings lasted 1 minute and 44 seconds on average, which was half of the average of 3 minutes in 1996. Engler, *Connecting Self-Representation*, *supra* note 37, at 48 n.47 (2010) (citing LAWYER'S COMMITTEE FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT (2003)); *see also* Petersen, *Building a House for Gideon*, *supra* note 62, at 76 ("In one study, most eviction cases took less than a minute, with many lasting fewer than 20 seconds." (citing WILLIAM

not have adequate time to explain their situations, as proceedings are concluded and judgments handed down effectively as soon as they stand in front of judges. As the New York Times describes, "Lawsuits are easy to file but onerous to fight . . . . Landlords rely on what amounts to an eviction machine," wherein tenants are subject to complex procedural requirements and overwhelming processes that diminish their ability to hold on to their homes.[154]

Recall Arleen. She arrived at the Milwaukee County Courthouse without a lawyer, relying on her *landlord* for guidance on how to proceed through the formalities of the process.[155] Meanwhile, her landlord—before the official proceeding began—had been speaking with the housing judge about another eviction claim she was bringing against a different tenant, appearing quite familiar indeed with the process.[156] This phenomenon is widespread: Even when landlords are not represented by counsel (which they are far more often than not), they enjoy advantages in housing court stemming from the power imbalances between them and tenant-defendants[157] and their status in the courts as repeat players.[158] University of North Carolina Law Professor Kathryn Sabbeth explains that the "power differential between the landlord and the tenant is based first and foremost on the tenant's dependence on the landlord for shelter."[159] Because the landlord controls a tenant's access to their home, this promotes a coercive and "psychological power over the tenant and all other occupants" that manifests and is exacerbated in housing court, where landlords enjoy more leverage.[160] Landlord familiarity with the summary eviction system further

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E. MORRIS INST. FOR JUSTICE, INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS 2 (2005))).

154. Barker et al., *supra* note 143.

155. DESMOND, EVICTED, *supra* note 2, at 100–03. Not only was Arleen's landlord her guide in housing court, but she was also her ride home after court. Arleen had no other means of transportation, further highlighting the difficulties tenants face in even attending housing court. *Id.* at 106.

156. *Id.* at 101–02.

157. "In the housing context, a landlord generally has far more power than a low-income tenant." Sabbeth, *Housing Defense*, *supra* note 151, at 99.

158. *Id.*; *see* Petersen, *Building a House for Gideon*, *supra* note 62, at 76 ("[L]andlords . . . fare much better than tenants regardless of merits, probably due to systemic bias.").

159. Sabbeth, *Housing Defense*, *supra* note 151, at 99.

160. Sabbeth writes that the tenant's reliance on the landlord for so basic a need as shelter incentives the tenant to preserve a landlord's willingness to provide shelter, even when in housing court defending against eviction. *Id.*; *see also* Kate Sablosky Elengold, *Structural Subjugation: Theorizing Radicalized Sexual Harassment in Housing*, 27 YALE J.L. & FEMINISM 227, 268–69 (2016) (describing the structure of legal rights around the

disadvantages tenants, for landlords have "far more expertise in handling housing litigation than the average tenant-defendant."[161] For one, judges are familiar with the law as it is presented by those who appear in their courtrooms most often: Landlords.[162] Even without counsel, Sabbeth describes that landlords' disproportionate representation in the housing courts over time has "influenced the law and culture of housing courts to favor the landlords' positions" such that judges are more familiar with the substantive and procedural law presented by landlords and less familiar with tenants' rights, even when these rights are articulated by statutory dictate.[163] Empirical data demonstrate this "fundamental unfairness of the forum" brought on by landlord familiarity and tenant unfamiliarity with the courts, even when neither party is represented by counsel.[164]

Of course, landlords are often counseled where tenants are not.[165] Thus, seemingly simple procedural hurdles in the summary eviction process can prove detrimental to tenants, since an absence of counsel disproportionately hurts them. In North Dakota, for example, tenants may be prevented from giving the court a written response to a landlord's complaint because the summary eviction process prevents them from petitioning for

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landlord-tenant relationship as giving the landlord significant coercive power, which increases instances of sexual harassment and assault).

161. Sabbeth, *Housing Defense*, *supra* note 151, at 99.

162. *Id.* at 78–79; Petersen, *Building a House for Gideon*, *supra* note 62, at 76 ("Judges know the law in the way it is presented by the repeat players in their courtroom, the landlords and their counsel."); *see also* STARR ET AL., *supra* note 138, at 8–10 (providing several examples of insufficient judicial knowledge of tenants' rights and defenses in the New York housing courts).

163. Sabbeth, *Housing Defense*, *supra* note 151, at 78. Sabbeth goes on to point to the significant implications this dynamic has for the judicial system at large, explaining that in an "adversary system of justice in which the judge's role is neutral and the parties are expected to compete in presenting their alternative versions of the case, the absence of counsel for one party raises basic concerns ranging from due process, fairness, and equality to accuracy of outcomes and legitimacy." *Id.* (footnotes omitted).

164. A 1992 study of Maryland rent court—where neither landlords nor tenants were represented by counsel—showed that landlords invariably won. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 608 (1992). Meanwhile, studies in Chicago and Phoenix, where landlords were represented 53% and 87% of the time, respectively, revealed that landlord win rates were effectively the same, regardless of whether landlords were represented by counsel. Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & C.R. L. REV. 697, 715 (2006) [hereinafter Engler, *Context-Based Civil Gideon*]; Russell Engler concludes from this data that "[w]hether the landlord is represented or not, the courts operate in a manner that swiftly serves the landlord's interests." *Id.*

165. *See supra* Part II.

filing fee waivers.[166] Landlords, meanwhile, almost never face this problem because of greater familiarity with the housing court system and greater access to financial resources, even without attorney assistance.[167] In various states, summary eviction procedures also lead to confusion as to which counterclaims may be asserted and when,[168] as well as whether claims for economic damages are permissible as counterclaims.[169] The result of these structural barriers is that "the summary procedure for eviction enables the landlord to enforce the terms of the leasehold within a framework designed for speed rather than fairness, [and] the relationship largely avoids judicial scrutiny."[170] Summary eviction proceedings—whose benefits are couched in the language of speed and efficiency—serve to funnel tenants through the system both without the benefit of counsel and without understanding the procedures to which they are being subject.[171]

Indeed, the research literature suggests that while landlords almost invariably have access to lawyers,[172] they generally do not need representation to prevail in housing court.[173] The opposite is true of tenants. Tenant-litigants benefit from counsel representation in a myriad of ways, and when they are provided with access to a lawyer, the difference in results is stark. Tenants are up to nineteen times more likely to avoid eviction and be successful in their cases if they enjoy representation.[174] In New York

166. Schmidt, *supra* note 14, at 598.

167. *See id.*

168. Difficulties in fact-finding may lead to confusion, and "in some jurisdictions it may lead to inconsistent applications of the law. For example, while in Ohio tenants *may* assert counterclaims when landlords join a claim for back rent . . . . it is not clear which counterclaims a tenant *must* assert." Spector, *Tenant Stories*, *supra* note 150, at 410.

169. *Id.* at 410–11 ("Oregon tenants may assert counterclaims for economic damages arising under the state's Residential Landlord and Tenant Act, but they may not assert tort claims for mental distress arising from the same facts.").

170. Spector, *Tenant's Rights*, *supra* note 21, at 137; *see also* Petersen, *Building a House for Gideon*, *supra* note 62, at 100 ("Sometimes only the issue of possession is at question [and] . . . . once the eviction action is commenced, a single, usually quick, hearing is held.").

171. *See id.*

172. While tenants in eviction hearings are rarely represented by counsel, the rate of counsel representation for landlords is often in the 85–90% range. Desmond, *Tipping the Scales*, *supra* note 9; Engler, *Connecting Self-Representation*, *supra* note 37, at 37 n.44 (pointing to several studies examining landlord counsel representation which found rates of: 87% landlord representation in Maricopa County, Arizona; 83.4% landlord representation compared to 20.4% for tenants in Berkeley, California; and 85% for landlords compared to 7% for tenants in Boston, Massachusetts).

173. Petersen, *Building a House for Gideon*, *supra* note 62, at 76; Sabbeth, *Housing Defense*, *supra* note 151, at 78 ("Landlords' disproportionate representation over time has influenced the law and culture of housing courts to favor the landlords' positions.").

174. Petersen, *Building a House for Gideon*, *supra* note 62, at 76–77.

City—which began to provide tenants the right to counsel in eviction proceedings as of 2017[175]—studies show that eviction orders have declined five times faster than in localities without this right.[176] Additionally, tenants more often receive favorable settlements, rent repairs and abatements, and are less likely to default.[177] That is to say, a right to counsel in eviction proceedings means tenants, and society at large are significantly more likely to avoid persistent homelessness, drains on material and emotional wellbeing, increased emergency room use, and increased risk of mental health hospitalization.[178]

However, summary eviction procedures often prevent tenants from seeking counsel representation. Summary eviction laws frequently do not provide tenants adequate time to obtain counsel,[179] and there is a dearth of attorney availability even when tenants do have time to search.[180] While advocates have long sought to challenge the constitutionality of these summary eviction proceedings, the Supreme Court effectively ended that hope in *Lindsey v. Normet*.[181] In 1972, the Court upheld the State of Oregon's summary eviction proceeding statute against both Due Process and Equal Protection challenges.[182] It decided that neither the speed of nor the limits imposed by the summary proceedings conflicted with the Fourteenth Amendment, pointing to the long-existing common law of property that

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175. New York City passed Intro. 214-B in 2017, which provides for "full legal representation" in housing court for income-eligible individuals making less than 200% of the federal poverty line. Brian Bieretz, *A Right to Counsel in Evictions: Lessons from New York City*, URB. INST. (Dec. 31, 2019), https://housingmatters.urban.org/articles/right-counsel-eviction-lessons-new-york-city# [https://perma.cc/S4NZ-35X7]; *see infra* Part II.B.

176. Petersen, *Building a House for Gideon*, *supra* note 62, at 77.

177. *Id.*; Engler, *Connecting Self-Representation*, *supra* note 37, at 49 (describing the same findings); Oksana Mironova, *NYC Right to Counsel: First Year Results and Potential for Expansion,* CMTY. SERV. SOC'Y (Mar. 25, 2019), https://www.cssny.org/news/entry/nyc-right-to-counsel [https://perma.cc/YP9Q-A3X7] (same).

178. ROBERT COLLINSON & DAVIN REED, THE EFFECTS OF EVICTIONS ON LOW-INCOME HOUSEHOLDS 30–31 (Dec. 2018), https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf [https://perma.cc/HKC9-UAE9].

179. Because eviction hearings in North Dakota must be heard within three to fifteen days after service upon a tenant, it is difficult, or even impossible, to file fee waivers and find attorney representation within this window. Schmidt, *supra* note 14, at 598 (citing N.D. CENT. CODE § 47-32-02 (2015)).

180. *Id.* (delineating the difficulties that tenants face in obtaining counsel based on short supply and adding that decreasing federal funding over a number of years has diminished access to legal aid organizations).

181. Lindsey v. Normet, 405 U.S. 56 (1972).

182. *Id.* at 56; Spector, *Tenant's Rights*, *supra* note 21, at 160 ("In 1972, the Supreme Court's decision in *Lindsey v. Normet* effectively eliminated any incentive for change to the summary procedure for eviction.") (footnote omitted).

justified treating parties' obligations under a lease independently.[183] Thus, the bifurcation of tenants' claims from any potential landlord misconduct in these summary proceedings did not conflict with the constitutional right to due process.[184] This holding galvanized scholars and advocates alike to seek alternate avenues of reform to summary eviction processes[185]—including through legislative rights to counsel like the one created in New York City. However, the summary eviction procedure has become entrenched as an indispensable obstacle to tenants asserting defenses to eviction attempts, and their existence underscores the benefits that a right to counsel in the eviction context may present. In Arleen's case, the housing judge asked her whether she was behind on rent, and her affirmative answer ended the question of liability.[186] The only questions remaining pertained to how much leniency she might be given on the timeline for her move-out, given that her two children lived with her.[187] Had she been provided counsel, however, perhaps she would have been able to raise several defenses and not lose her home. This Note now considers legislative efforts to do just that—provide tenants access to counsel when they face eviction from their homes.

C. Legislative Efforts to Provide Counsel: Why Representation Matters

In August 2017, then-Mayor of New York City, Bill de Blasio, signed into law a bill[188] requiring the New York City Office of Civil Justice ("OCJ") to provide legal representation for low-income tenants facing eviction proceedings in housing court (the "RTC law").[189] The RTC law provides tenants with incomes less than 200% of the federal poverty line—$49,200 for a family of four in 2017 and $43,622 for a family of three with one child

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183. *Normet*, 405 U.S. at 65.

184. Spector, *Tenant's Rights*, *supra* note 21, at 162.

185. *Id.* at 162–63.

186. DESMOND, EVICTED, *supra* note 2, at 104.

187. *Id.* at 104–05.

188. Intro 214-B codified at N.Y.C. ADMIN. CODE § 26-1302. The law provides, in pertinent part, that "[a]ll covered individuals receive access to brief legal assistance no later than their first scheduled in a covered proceeding in housing court, or as soon thereafter as is practicable" and that "[a]ll income-eligible individuals receive access to full legal representation no later than their first scheduled appearance in a covered proceeding in housing court . . . ." *Id.*; § 26-1302(a)(1)–(2).

189. *See* Press Release, Office of Bronx Borough President Vanessa L. Gibson, Mayor Signs Right to Counsel Legislation Sponsored by City Council Members Mark Levine and Vanessa L. Gibson [hereinafter Announcement of Vanessa L. Gibson], https://bronxboropres.nyc.gov/2017/08/11/mayor-signs-right-to-counsel-legislation-sponsored-by-city-council-members-mark-levine-and-vanessa-l-gibson/ [https://perma.cc/PS9R-FJXS].

in 2021[190]—access to attorney representation in housing court, with an initial aim of extending the program to all the City's zip codes by 2022.[191] However, in the wake of the COVID-19 pandemic—with potential eviction posing significantly elevated health risks and economic uncertainty for tenants—this timeline was accelerated, and citywide implementation of the RTC law has been required in New York City housing courts since June 1, 2020.[192] In enacting this legislation, New York City has set a powerful example, demonstrating that a right to counsel does in fact drastically reduce the number of unwarranted evictions. New York's RTC law has also catalyzed jurisdictions around the United States to follow its example and provide tenants with access to attorney representation in housing court. As such, the program's positive results support this Note's conclusion that a federal right to counsel in eviction proceedings is warranted under the Due Process Clause of the Constitution.

In 2014, New York City Council Member Mark Levine introduced the RTC legislation, arguing that too many City residents faced eviction simply for their inability to access legal counsel.[193] He pointed out that of the 22,000 New York evictions in 2015, only 20% of tenants had representation compared to nearly 100% of landlords—despite the fact that legal representation for tenants in the City was shown to reduce the chances of

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190. *Id.*; Oksana Mironova, *Right to Counsel Works: Why New York State's Tenants Need Universal Access to Lawyers During Evictions*, CMTY. SERV. SOC'Y (Mar. 7, 2022), https://www.cssny.org/news/entry/right-to-counsel-new-york-tenants-lawyers-evictions [https://perma.cc/D4G7-SH8K].

191. Mironova, *supra* note 177.

192. Int. No. 2050-2020, amending N.Y.C. ADMIN. CODE § 26-1302; *see* New York City's First-in-Nation Right-to-Counsel Program Expanded Citywide Ahead of Schedule, CITY OF NEW YORK (Nov. 17, 2021), https://www1.nyc.gov/office-of-the-mayor/news/769-21/new-york-city-s-first-in-nation-right-to-counsel-program-expanded-citywide-ahead-schedule [https://perma.cc/XEQ2-B3H5] (["T]hrough the citywide implementation of the Right to Counsel program in 2020, 100 percent of tenants with calendared eviction cases had access to legal services, and 71 percent of tenants who appeared in Housing Court had full representation by attorneys . . . .").

193. Council Member Levine asserted, "Too many of the most vulnerable New Yorkers face eviction simply because they don't have the means to hire an attorney . . . No longer will . . . [they] have to fend for themselves in Housing Court. New Yorkers have a right to affordable housing and to a fair justice system." *New York City Council Passes Right to Counsel Legislation*, PROGRESSIVE CAUCUS N.Y.C. COUNCIL (July 20, 2017), https://nycprogressives.com/2017/07/20/new-york-city-council-passes-right-to-counsel-legislation/ [https://perma.cc/K5WS-XKEX]; *see also* N.Y. INDEP. BUDGET OFF., *The Rising Number of Homeless Families, 2002–2012: A Look at Why Families Were Granted Shelter, the Housing They Had Lived & Where They Came from* (Nov. 2014), https://ibo.nyc.ny.us/iboreports/2014dhs_families_entering_NYC_homeless_shelters.html [https://perma.cc/AKW7-XWLT] (noting that in 2014, eviction was the most common reason for families ending up in New York City shelters and ultimately homeless).

eviction by 77%.[194] In supporting the bill, a report commissioned by the New York City Bar Association estimated that the costs of tenant representation in housing court would be offset by, for example, reductions in family and individual shelter entry costs, to the tune of $320 million in net annual savings.[195] Moreover, the report estimated that 5,237 families per year could avoid entering shelters if provided with anti-eviction legal services.[196] Yet still, these prognostications did not capture the extent of the unquantifiable anticipated benefits of granting tenants legal counsel. The report also projected that both tenants and the City would benefit from avoiding numerous downstream costs associated with removing tenants from their homes, the savings from which would be difficult to calculate in the short term.[197]

The first four years of results from the RTC law in New York have largely lived up to these expectations, underscoring the benefits that a federal right to counsel would have for uncounseled tenants facing eviction. According to the OCJ, since the institution of a right to counsel, legal representation rates for tenants appearing in housing court have increased significantly.[198] Meanwhile, the number of tenant evictions has dropped

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194. Announcement of Vanessa L. Gibson, *supra* note 189.

195. STOUT RISIUS ROSS, INC., *The Financial Cost and Benefits of Establishing a Right to Counsel in Eviction Proceedings Under Intro 214-A*, at ¶¶ 6, 15, 17, 100 (March 16, 2016), https://cdn2.hubspot.net/hubfs/4408380/PDF/Cost-Benefit-Impact-Studies/SRR%20 Report%20%20Eviction%20Right%20to%20Counsel%20%203%2016%2016.pdf [https://perma.cc/7AD5-BZ9M]. In calculating this figure, the report noted that the cost savings from having to shelter fewer families would be approximately $226 million, and for sheltering individuals $25 million—about $251 million in sheltering savings. *Id.* at ¶ 11. The report also noted that some costs, such as those associated with education, juvenile justice, and welfare costs for homeless children, as well as the costs enforcing rent laws and regulations were more difficult to quantify and thus not included in the calculation. *Id.* at ¶¶ 15–16.

196. *Id.* at ¶ 10.

197. The report projected that enabling tenants to have access to anti-eviction legal representation would decrease costs associated with homeless children's education, juvenile justice, and welfare costs; the costs of providing welfare when jobs are lost due to eviction; and enforcement of rent laws and regulations. *Id.* at ¶ 16.

198. The New York City's annual Universal Access to Legal Services report notes that "more than 71% of tenants who appeared in Housing Court for eviction cases in the fourth quarter of FY2021 were represented by attorneys in court . . . ." OFF. OF CIV. JUST., N.Y.C. HUM. RES. ADMIN., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR FOUR OF IMPLEMENTATION IN NEW YORK CITY 5 (2021), https://www1.nyc.gov/assets/hra/down loads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2021.pdf [https://perma.cc/ B7VH-648V] [hereinafter OFF. OF CIV. JUST., YEAR FOUR IMPLEMENTATION]. This figure is significantly higher than the 38% representation rate for tenants reported in the first half of 2020—and higher still than the 1% representation rate reported in 2013. *Id.* Encouragingly, this increase in tenant representation has been seen all across New York City and has not been concentrated in certain zip codes or boroughs. Where in the last

precipitously.[199] During the last quarter of 2021, more than 71% of tenants facing an eviction in the City appeared in housing court with an attorney—compared to 38% in the first half of 2020, and merely 1% in 2013.[200] In fact, between July 1, 2020 and June 30, 2021, "84% of households represented in court by lawyers were able to remain in their homes, preserving these tenancies and promoting the preservation of affordable housing and neighborhood stability."[201] This means that, of the 122,452 individuals against whom evictions were filed in 2021, 99,775 enjoyed counsel representation.[202] Moreover, the number of evictions *filed* in housing court has also dropped. Where approximately 250,000 evictions were filed in 2013 in New York City, only 57,964 were filed in 2021.[203] Though this decline was largely driven by both federal and state moratoria on evictions,[204] the evidence does suggest that the drop-off in eviction filings predates the moratoria.[205] In 2019, two years after the initial rollout of the RTC program, there were approximately 220,000 eviction filings—lower than the 250,000

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quarter of 2018, Staten Island had the highest tenant representation rate at 46% and the Bronx the lowest at 23%, the end of 2021 saw all boroughs enjoying greater representation rates, with the Bronx and Manhattan tied for the highest representation rates at 88% and Brooklyn the lowest at 55%. *Id.* at 6; *see also* OFF. OF CIV. JUST., N.Y.C. HUM. RES. ADMIN., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR THREE OF IMPLEMENTATION IN NEW YORK CITY 3 (2020) [hereinafter OFF. OF CIV. JUST., YEAR THREE IMPLEMENTATION], https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2020.pdf [https://perma.cc/F5UH-TY2X] (reporting tenant representation rates in New York City as of the fall of 2020, after three years of the RTC program).

199. In 2019, 16,996 evictions were conducted in New York City compared to 22,089 in 2016 and 28,849 in 2013, before the City instituted any kind of right to counsel. OFF. OF CIV. JUST., YEAR FOUR IMPLEMENTATION, *supra* note 198, at 12. 2020 saw just 3,035 evictions, but this decline was largely driven by federal and state eviction moratoria in response to Covid-19. *Id.*; *see infra* note 197 (discussing eviction moratoria).

200. OFF. OF CIV. JUST., YEAR FOUR IMPLEMENTATION, *supra* note 198, at 5.

201. *Id.* at 8. This 84% figure is also the same as in previous years, as data from previous years also indicated the same percentage of residents represented by OCJ lawyers were able to avoid eviction. Mironova, *supra* note 177.

202. OFF. OF CIV. JUST., YEAR FOUR IMPLEMENTATION, *supra* note 198, at 10, 16. The New York City report breaks the counsel representation figures down both by individuals and households covered by representation. Because evictions are filed against households, counsel representation is provided to the household, rather than each individual within it. Thus, the 122,452 individuals against whom evictions were filed reflect 57,964 household eviction filings, and the 99,775 individuals represented by counsel were part of the 42,265 households to whom OCJ provided counsel representation. *Id.*

203. *Id.* at 10.

204. *See supra* notes 120–131 (discussing federal and state eviction moratoria during COVID-19).

205. *See* Off. of Civ. Just., Year Four Implementation, *supra* note 198, at 10, 16.

in 2013.[206] When tenants are accompanied by lawyers in housing court, they "have a greater sense that they are being treated with dignity and respect" because "[t]he behavior of judges and opposing counsel [changes] as the expectation changes that the litigation will require hearing from both sides in an equal manner."[207] Represented tenants file more pretrial motions, which correspond to decreased numbers of emergency orders to show cause.[208] Lawyers ensure that tenants seeking to avoid eviction have the requisite tools and knowledge necessary to protect their property and liberty interests in the continued occupancy of their homes,[209] and their presence allows for a substantive litigation process rather than a mere formality where landlords are able to prevail as a matter of course.[210] Indeed, even landlord attorneys in New York have commented that tenant representation eases case management and allows for more expedient resolutions for both parties.[211]

As New York City expands its right to counsel program and OCJ aims to guarantee counsel representation to all tenants facing eviction, the portion of tenants given a meaningful chance to avoid displacement has steadily

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206. N.Y.C. DEP'T OF SOC. SERVS., OFF. OF CIV. JUST. 2020 ANNUAL REPORT 25 (2020), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2020.pdf [https://perma.cc/FF9W-M28V]. An analysis of contemporaneous data also reveals that the number of eviction filings declined more precipitously in those zip codes covered by the legislative right to counsel at the time than in non-covered zip codes. The average covered zip code showed an 11% decline in filings from 2017 to 2018, while the average comparable non-covered zip code showed a 2% decline. Mironova, *supra* note 177; *see also* N.Y.C. BAR ASS'N, REPORT ON LEGISLATION BY THE TASK FORCE ON CIVIL RIGHT TO COUNSEL AND THE HOUSING COURT COMMITTEE 3 (2020), https://s3.amazonaws.com/documents.nycbar.org/files/2020656-Intro1104CounselforTenants.pdf [https://perma.cc/7KRB-NUCJ] (pointing out that in 2018, after the enacting of a right to counsel for tenants, there were 29,000 fewer eviction proceedings than in 2013).

207. N.Y.C. BAR ASS'N, *supra* note 206, at 3 (quoting Roger Juan Maldonado, New York City Bar Ass'n, Remarks for the Chief Judge's Statewide 2019 Civil Legal Services Hearing 4 (2019), https://s3.amazonaws.com/documents.nycbar.org/files/2019566-MaldonadoCivilLegalServicesFundingTestimony.FINAL.pdf [https://perma.cc/KKA3-WYP3]).

208. *Id.* at 3.

209. *See* Ian S. Thompson, *Securing Tenants' Right to Counsel Is Critical to Fighting Mass Evictions*, ACLU (Nov. 9, 2020), https://www.aclu.org/news/racial-justice/securing-tenants-right-to-counsel-is-critical-to-fighting-mass-evictions/ [https://perma.cc/HT8D-EQEU] ("In securing a universal right to counsel in eviction proceedings, [No Eviction Without Representation] will ensure that renters have the tools and knowledge they need to safeguard their housing rights and help balance power between landlords and tenants.").

210. N.Y.C. BAR ASS'N, *supra* note 206.

211. *Id.* at 3.

grown.[212] New York has also catalyzed cities across the country to follow its example. Since it enacted the RTC law, other cities have sought to create their own tenant's right to counsel legislation; these cities are Newark, New Jersey; San Francisco, California; Santa Monica, California; Philadelphia, Pennsylvania; Boulder, Colorado.[213] Yet, outside of these locations, tenants continue to face onerous burdens defending themselves in eviction proceedings.[214] Thus, Part III of this Note argues that, to mitigate the effects of the eviction crisis across the United States, the right to counsel in evictions ought to be provided to all tenants as a matter of right. It puts forth a framework for finding a constitutional right to eviction counsel, akin to the right for criminal defendants, through existing substantive due process doctrine in the Fourteenth Amendment.

III. Finding a Constitutional Right to Counsel in Eviction Proceedings Through Substantive Due Process

This Part argues that the Supreme Court's substantive due process jurisprudence offers a convincing framework through which to find a fundamental constitutional right to counsel in eviction proceedings. In particular, the two approaches articulated in *Glucksberg* and *Obergefell* provide a schema for analyzing why such a right should be considered fundamental. This Note argues that both approaches support the conclusion that the right to counsel in eviction proceedings could constitute a constitutional fundamental right if asserted in a test case challenging statutory summary eviction procedures. Where *Glucksberg* asks us to consider whether the asserted liberty right is "deeply rooted in this Nation's history and tradition"[215] and "implicit in the concept of ordered liberty"[216]—

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212. Advocates in the City are now pushing to expand the program's eligibility to cover tenants with incomes up to 400% of the federal poverty limit, as opposed to 200%, and also to expand the types of eviction cases covered by the RTC law. Mironova, *supra* note 177.

213. OFF. OF CIV. JUST., YEAR THREE IMPLEMENTATION, *supra* note 198, at 1. As of March 2022, the list of cities providing a right to counsel for tenants includes New York, NY; San Francisco, CA; Newark, NJ; Cleveland, OH; Philadelphia, PA; Boulder, CO; Baltimore, MD; Seattle, WA; Louisville, KY; Denver, CO; Toledo, OH; Minneapolis, MN; and Kansas City, MO. Additionally, the States of Washington, Maryland, and Connecticut have provided for statewide rights to counsel to tenants facing eviction. NAT'L COAL. FOR A CIVIL RT. TO COUNSEL, *The Right to Counsel for Tenants Facing Eviction: Enacted Legislation* 2 (March 2022), http://civilrighttocounsel.org/uploaded_files/283/RTC_Enacted_Legislation_in_Eviction_Proceedings_FINAL.pdf [https://perma.cc/XK76-H3SL].

214. *See supra* Part II.B.

215. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (plurality opinion) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

216. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

requiring a "careful description" of the right[217] —*Obergefell* offers a seemingly more holistic approach. Indeed, the *Obergefell* Court considered history and tradition but did not limit itself to them, instead referencing broad principles to decide that a fundamental right to same-sex marriage exists based on the established right to marriage.[218] The right to counsel in eviction proceedings implicates two specific interests that courts have long considered to be important: A tenant's property interest in the continued occupancy of their home and a person's liberty interest in meaningful access to the courts and judicial system. Taken together, that tenants appearing in housing court without attorney representation risk arbitrary deprivation of their right to continued occupancy of their homes and are generally not provided with meaningful access to and interaction with the judicial system weighs in favor of recognizing a right to counsel in eviction proceedings as fundamental. This conclusion is supported by the two-pronged *Glucksberg* approach and the more holistic *Obergefell* approach.

A. The Glucksberg Formulation for Finding a Fundamental Right to Counsel

While scholars have tended to consider *Glucksberg*'s articulation of the scope of fundamental rights a more circumscribed approach than the *Obergefell* formulation,[219] a fundamental right to counsel in eviction proceedings might nonetheless be permitted by the Court's opinion. Based on the deeply rooted interests a tenant enjoys in the continued occupancy of their home and in meaningful access to the judicial system, a right to counsel flows from the judicial tradition of the United States and would thus appear to be "implicit in the concept of ordered liberty."[220] Moreover, focusing on the particular interests of tenants, as opposed to civil litigants at large, centers the analysis on the particular interests that tenants find themselves defending in housing court, allowing us to "carefully describe" the asserted right.

217. *Id.* (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).
218. Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015).
219. *See supra* Part I.B.2.
220. *Glucksberg*, 521 U.S. at 721.

1. Tenant's Historical Property Interest in Continued Occupancy of Their Home

In 1972, Justice Douglas dissented from the Court's decision in *Lindsey v. Normet*, which upheld Oregon's summary eviction proceeding against constitutional challenges.[221] He wrote

> [W]here the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing. In the setting of modern urban life, the home, even though it be in the slums, is where man's roots are. To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic question in the case.[222]

Though the Court majority decided that the appellants in the case did not convincingly demonstrate that Oregon's law violated their asserted due process and equal protection rights,[223] it did recognize the importance of the home to tenants.[224] Indeed, this interest—a person's interest in the continued occupancy of their home—is firmly entrenched in the United States constitutional tradition.

The history of legal treatment of landlord-tenant relationships in the United States is one of slow but steady evolution. From the Middle Ages until the eighteenth and nineteenth centuries, the common law assumed that the most important asset in a leasehold agreement was the land itself, which greatly limited a landlord's duty to maintain the facilities erected on the

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221. The issue in *Lindsey* was whether Oregon's statute governing wrongful detainer actions violated due process by requiring that a trial occur within six days of service of the complaint and equal protection by classifying tenants covered by the Oregon Forcible Entry and Wrongful Detainer Statute differently than litigants subject to other litigation procedures. Lindsey v. Normet, 405 U.S. 56, 64–74 (1972).

222. *Id*. at 89–90 (Douglas, J., dissenting).

223. The plaintiffs asserted that they had the "right to retain peaceful possession of [their] home," which was violated by expedited procedures in wrongful detainer actions. *Id*. at 73.

224. While the Court ultimately held that Oregon's statute did not impermissibly discriminate against a constitutionally protected group and was rationally related to its purpose, it also recognized "the importance of decent, safe, and sanitary housing." It also, however, concluded during the pre-*Glucksberg* era that "the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." *Id*. at 73–74.

land.[225] This rule began to change in the early United States, however. As Judge Wright described in his canonical *Javins v. First National Realty Corp.* opinion: "The common law rule . . . . was perhaps well suited to an agrarian economy . . . . [but] [c]ourt decisions in the late 1800's began to recognize that the factual assumptions of the common law were no longer accurate . . . ."[226] Courts during the nineteenth century began to require more exacting duties from landlords in the course of their relationships with tenants in comparison to the common law approach.[227] The upshot of these changes was an increased concern with landlord actions that improperly displaced tenants, changes in the law to mitigate the adverse effects of abrupt lease termination on tenants,[228] and an increased convergence between the property and contractual aspects of the landlord-tenant relationship.[229] Indeed, this latter point was solidified in the monumental 1970 *Javins* decision, wherein the D.C. Circuit held that a landlord is bound by an implied warranty of habitability, breach of which gives rise to the usual remedies for

225. As such, a lessor (or landlord) had no obligation to repair buildings on the land—a rule suited for an agrarian society. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir. 1970); *see also* 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 131–32 (2d ed. 1923) (describing that because the land was by far most important to the leasehold agreement, the rent issued from the land).

226. *Javins*, 428 F.2d at 1077. Judge Wright pointed out, for example, that the common law rule requiring a tenant to pay rent even if buildings on the leased land were destroyed was "ludicrous." He cited several lines of cases from states across the country in which courts rejected this premise, leading to a new consensus that tenants generally have interests in the buildings attached to the land in a lease relationship, not the land itself. *Id.* at 1077–78.

227. The New York Court of Appeals, for instance, held that an upper story tenant was not obligated to continue paying rent when his building burned down, describing that the tenant had no interest in the soil upon which the building was built, but instead in the building itself. Thus, even though at common law the rent might still have been due "where the interest of the lessee in a part of the demised premises was destroyed by the act of God," in this case the tenant took no interest in the land and so his leasehold interest was dissolved with the building. Graves v. Berdan, 26 N.Y. 498, 499–500 (1863). Meanwhile, the Massachusetts Supreme Judicial Court held that *caveat emptor* should not apply to short term leases because "there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make . . . ." The Court thus mandated that the lessors ensure the property's fitness for use. Ingalls v. Hobbs, 156 Mass. 348, 351 (1892).

228. For example, courts became more loathe to assume a tenancy was terminable at will, "hesitant to subject a tenant to immediate dispossession unless it was clear that both parties had agreed to such an arrangement." Glendon, *supra* note 18, at 507. They also employed myriad exceptions to the presumption that a lease for an indefinite period gave rise to a tenancy at will, ensuring that tenants would not be displaced without advanced notice out of concern with the effects of abrupt termination on tenants. *Id*.

229. *See id*.

breach of contract.[230] The courts began to recognize that a tenant's interest in the land ought to be protected from arbitrary deprivation and that a landlord, despite retaining ownership of the leased land, could not violate a tenant's own property interest in the home.[231]

Moreover, since the nineteenth century, the courts have continued to recognize the weighty importance of a tenant's interest in their property, including in continued occupancy of their homes. The Supreme Court itself has established that in the eminent domain context. For example, a tenant has a constitutionally protected property interest when leased property is subject to a taking, such that they are owed just compensation.[232] In deciding as much, the Court wrote, "[T]he tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. And since they are property distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such."[233] Thus, the Court not only proclaimed that tenants are due just compensation when forced to relinquish property interests under the Constitution,[234] but also that tenants generally enjoy protected rights to occupancy that cannot be deprived without due process. Similarly, the Court has employed seemingly soaring language—in *Pernell v. Southall Realty*—to hold that tenants facing eviction in ejectment actions are guaranteed trials by jury under the Seventh Amendment, notwithstanding the potential delays to the judicial process.[235] These developments underscore the firm historical

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230. *Javins*, 428 F.2d at 1072–73.

231. *See id*.

232. United States v. General Motors Corp., 323 U.S. 373, 384 (1945); *see* Kohl v. United States, 91 U.S. 367, 377 (1876) (acknowledging and administering the just compensation requirement); *see also* Victor P. Goldberg et al., *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Awards Between Landlord and Tenant*, 34 UCLA L. REV. 1083, 1086–87 (1987) (describing a tenant's property interest for eminent domain purposes).

233. *General Motors Corp.*, 323 U.S. at 384.

234. In particular, tenants are due compensation under the Fifth Amendment's Takings Clause, which is incorporated against the states through the Fourteenth Amendment. *See* Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 122 (1978).

235. The Court has written:

> Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.

Pernell v. Southall Realty, 416 U.S. 363, 385 (1974); *see infra* Part III.A.2 (discussing the implications of *Pernell* for tenants' liberty interests in meaningful access to the courts).

roots of a tenant's property interest in the continued occupancy of the home that would be protected by a right to counsel in eviction proceedings.

2. Firmly Rooted Liberty Interest in Meaningful Access to Courts and the Judicial System

Like all litigants, tenants enjoy deeply rooted liberty interests in meaningful access to the judicial system. This access is largely prevented, however, where tenants are not provided with counsel in housing court because of the significant disadvantages they face compared to landlords.[236] In *Gideon*, the Court extended the Sixth Amendment's guarantee of counsel to accused criminal defendants to state criminal proceedings[237] on the basis that the provision of criminal counsel is "fundamental and essential to a fair trial" and "necessary to insure fundamental human rights of life and liberty."[238] The Court drew on the inherent disadvantages that uncounseled criminal defendants face in criminal proceedings, noting that governments spend "vast sums of money" to prosecute accused defendants, while defendants are at significant risk of prosecution for simple inability to hire counsel.[239] Indeed, the Court quoted the famous passage from Justice Sutherland in *Powell v. Alabama* to emphasize that access to the court is meaningless from a due process standpoint if it does not come with the right to be accompanied by counsel in court.[240] It also drew on the historical underpinnings of a right to counsel in the American legal tradition, proclaiming that the guarantee of counsel is among the most fundamental of constitutional rights that has long been guaranteed.[241] The logic underlying

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236. *See supra* Part II.A., (delineating the disparities between landlord and tenant representation).

237. The Court incorporated the Sixth Amendment against the states through the Fourteenth Amendment's Due Process Clause. Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963).

238. *Id.*

239. *Id.* at 344. The Court also emphasized that because of the disparities in access to counsel it described, "[t]hat government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." *Id.*

240. The *Gideon* Court wrote, "This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him . . . . [because] [t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable . . . .'" *Gideon*, 372 U.S. at 344–45 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

241. The *Gideon* Court described that its wavering from the proposition that states must guarantee criminal defendants defense by counsel in *Betts v. Brady* was a mistake. *Id*. at 343–44. It was wrong. "[I]n deciding as [*Betts*] did—that 'the appointment of counsel is not a fundamental right, essential to a fair trial'—the Court . . . made an abrupt break with

the Court's analysis in *Gideon* enjoys many similarities in the eviction context. Though tenants do not face incarceration in the same way that criminal defendants do, the deprivation of their property rights and the potential homelessness and displacement that often accompany eviction[242] import a significant liberty right in meaningful access to the judicial system—that is, the guarantee of counsel representation when appearing in housing court.

In *Pernell,* the Court staunchly reiterated that the judicial system ought not be a rubber stamp for a landlord's decision to evict their tenant.[243] Rather, the courts must allow for due process and the opportunity for both parties—but particularly tenants—to present their cases to ensure the provision of fair justice.[244] This included allowing a jury trial for actions in ejectment. The decision emphasizes the direct application of the Court's "meaningful access" jurisprudence to the eviction context and why such access is "deeply rooted" in the nation's mores and traditions.[245] Such a concern about *meaningful* access to the courts—as opposed to pro forma access—has considerable basis in the U.S. constitutional history, bolstering the case for a right to counsel in evictions under *Glucksberg* substantive due process. In *Boddie v. Connecticut*, the Court held that due process required that women seeking dissolution of their marriages not be denied access to the courts for mere inability to pay.[246] Rather, the Constitution requires that "a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."[247] The fundamental character of the *Boddie* decision is that due process concerns are—and always have been—associated with rule of law, fundamental fairness, and access to justice.[248] Indeed, excluding plaintiffs from the judicial forum when the judiciary is the only avenue to resolve their disputes raises significant

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its own well-considered precedents. In returning to these old precedents . . . we but restore constitutional principles established to achieve a fair system of justice." *Id.* As such, the Court couched its own decision in the language of tradition and precedent, citing longstanding examples to emphasize that the right to counsel has historically been recognized as important in the United States. *Id.*

242. *See supra* Part II.B.

243. *See* Pernell v. Southall Realty, 416 U.S. 363, 385 (1974).

244. *Id.*

245. *See id.* ("A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases.").

246. The Court described "meaningful opportunity" as an opportunity "granted at a meaningful time and in a meaningful manner" whereby the details might change but that the outcome is not guaranteed based on considerations beyond the merits of the arguments presented. Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971).

247. *Id.*

248. Schroeter, *supra* note 12, at 37.

legitimacy concerns, placing plaintiffs in the position of criminal defendants who are in court out of necessity and not out of their own volition.[249]

Tenants in eviction proceedings are thrust into a strikingly similar conundrum as the plaintiffs in *Boddie*: Either they show up to housing court, usually unable to and unknowledgeable of how to defend their interests, or they lose in default judgment and solidify their evictions.[250] Thus, they share more in common with criminal defendants—who are at risk of erroneous deprivation of their physical liberty and thus provided with counsel—than civil plaintiffs seeking to vindicate asserted interests. Moreover, just as the *Boddie* court recognized that the fundamental importance of marriage to American society merited weight in considering the procedural requirements for a judicial hearing and meaningful judicial access,[251] the courts should recognize the fundamental importance of the home to American society.[252] Where the home forms the bedrock for society and evicted tenants face significant negative ramifications if deprived of their tenancies, the Constitution should more heavily scrutinize the procedures used in court because of tenants' weighty property and liberty interests.

The concept of "meaningful access" to the courts and judicial system has appeared in several cases since *Boddie*, underscoring the Court's conception that litigants have liberty interests in truly having the opportunity to present, argue, and defend their cases for a decision on the merits. For example, in 1977, the Court appeared to broaden the scope of what constitutes meaningful access in *Bounds v. Smith*.[253] The Court held that prisoners challenging their sentences or the conditions of their incarceration must be provided sufficient access to legal materials so as to be able to present "an adversary presentation" to respond to government arguments.[254] It concluded that the lack of library access in prisons violated this right.[255] Critically, not only did the Court decide as much, Justice Marshall

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249. *Id.*

250. *See supra* Part II.B.

251. *Boddie,* 401 U.S. at 378 ("The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the substantive proceedings."); *see also id.* at 376 ("As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society.").

252. *See* DESMOND, EVICTED*, supra* note 2, at 300.

253. 430 U.S. 817 (1977). In *Bounds*, prisoners argued that they were denied access to the courts because they did not have adequate access to law libraries and were thus unable to challenge their convictions and conditions of incarceration while in prison. *Id.* at 825.

254. *Id.* at 825–26; *see also* Laura K. Abel, Turner v. Rogers *and the Right to Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 809 (2012) (analyzing the *Bounds* Court's opinion).

255. *Bounds*, 430 U.S. at 825–26.

couched his majority opinion in the language of constitutional fundamental rights, rather than procedural due process:

> We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.[256]

In so writing, Justice Marshall and the Court laid the groundwork for the finding for a fundamental right to counsel in the eviction context. Meaningful access to the courts for tenants, as New York City's legislative experiment in recent year demonstrates, means appearing in court with counsel.[257] As a result, the Court's jurisprudents would seem to tilt in favor of requiring that tenants be provided with representation by counsel as a fundamental substantive due process right. Such a heightened requirement is best served by constitutionally requiring that tenants be provided with counsel representation in eviction proceedings, given the benefits of representation and detriments of being uncounseled.[258]

In sum, the Supreme Court's *Glucksberg* framework gives rise to two separate cognizable interests that form the basis for a fundamental right to counsel in eviction proceedings. Tenants' property interests in the continued occupancy of their homes and their liberty interests in meaningful access to the courts and judicial system are—given the Supreme Court's own jurisprudence—deeply rooted interested that have longstanding foundations in the Nation's mores and traditions. Additionally, by limiting the analysis to a fundamental right to counsel *in eviction proceedings*, the right more closely falls in line with the Supreme Court's cautioning that asserted substantive due process rights must be carefully described so as to be "implicit in the concept of ordered liberty."[259] Thus, *Glucksberg,* though admittedly envisioning a more circumscribed and strict approach to recognizing constitutional fundamental rights, nonetheless allows significant room for recognizing a right to counsel in eviction proceedings.

B. The *Obergefell* Formulation

While the bulk of this Part has focused on how a fundamental right to counsel in evictions might fit into the Court's *Glucksberg* articulation (since *Glucksberg* is, after all, the stricter formulation), such a right also fits within

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256. *Id.* at 828.
257. *See supra* Part II.B.
258. *Id.*
259. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

the Court's approach to substantive due process in *Obergefell*. In *Obergefell*, the Court employed a more holistic approach to determine whether substantive due process provides a right to same-sex marriage—supplementing history and tradition with "reasoned judgment."[260] "Reasoned judgment" appears to incorporate any such interests that the Court deems critical and tending to support the fundamental importance of the asserted right in society.[261] While in *Obergefell* this included four particular implications flowing from a decision not to recognize a right to same-sex marriage,[262] "reasoned judgment" in the eviction context necessarily requires a consideration of three factors. These three factors, when taken together—and combined with the history-and-tradition *Glucksberg* analysis—bring a fundamental right to counsel in the eviction context in even closer lockstep with the Court's substantive due process jurisprudence.

First, a court should exercise "reasoned judgment" by taking note of the potential consequences tenants are at risk of when they do not have counsel representation in eviction proceedings. In so doing, it should place particular weight on the role this representation has in mitigating the risk of homelessness. As described in Part II, one of the most enduring social consequences of representation disparities in housing court, if not the worst, is that tenants are strikingly likely to be evicted and thrust into homelessness.[263] Indeed, in New York City, "[t]he dislocations from housing court can echo for years," with many "end[ing] up doubled up with relatives or in homeless shelters."[264] In much the same way that the Court relied on the support the institution of marriage—and, by extension, the right to marriage—provides to a two-person union,[265] representation by counsel supports the foundation of the family in the home. The *Obergefell* Court wrote: "[T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[266] The right to counsel in proceedings that threaten to deprive the family unit of its existential foundations is also unlike any other in its importance to the nuclear group. Displacement and looming homelessness through eviction pose an existential threat to the support structure that the home provides for

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260. Obergefell v. Hodges, 576 U.S. 644, 664 (2015); *see supra* Part I.B.2; *see also* Yoshino, *New Birth of Freedom*, *supra* note 73, at 164 (explaining Justice Kennedy's reliance on the concept of "reasoned judgment").

261. *See Obergefell*, 576 U.S. at 663–64.

262. *Id.* at 665.

263. *See supra* Part II.C.

264. Barker et al., *supra* note 143.

265. *Obergefell*, 576 U.S. at 666.

266. *Id.*

a family in much the same way that marriage provides to a committed couple. Reasoned judgment, thus, serves to emphasize the importance of a fundamental right to counsel when that support structure is placed at risk by the state.

Second, the unique support that flows from any litigant's, but particularly a tenant's, access to counsel weighs in favor of recognizing a fundamental right to counsel representation. Courts and scholars alike have long recognized that the relationship between a lawyer and their client is of crucial importance to the equitable functioning of the judicial system.[267] Indeed, the Court in *Gideon* emphasized the fundamental basis of its decision as being that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"[268]—a conclusion it described as an "obvious truth."[269] Reasoned judgment would seem to support that this conclusion extends to the eviction context. As described in Part II, eviction proceedings are frequently decided based on considerations outside the merits of landlord-tenant disputes.[270] Counsel representation serves to mitigate this distortion, evening the balance of power in proceedings which tenants are mandated to attend. This protects the legitimacy of the housing courts and allows them to more equitably discern the rights of the litigants brought before them.

Third, reasoned judgment should heavily weigh the positive externalities that a right to counsel in eviction proceedings can lend to American society at large, particularly vis-à-vis the provision of social services and housing to families. New York City has steadily increased its investment in its RTC program over the last several years, increasing the budget for tenant legal services from $6 million in 2013, before the enactment of the RTC law, to $136 million in 2021 and a projected $166 in 2022.[271] Despite these significant increases in the City's expenditures, its annual investments still fall well below the approximately $320 million in savings the RTC law was projected to save annually at the time of its introduction.[272] These savings have been heavily concentrated in the costs of maintaining homeless shelters[273]—that is, because more tenants have been

267. *See, e.g.*, *supra* notes 172–187 and accompanying text (highlighting the importance of a right to counsel in court proceedings and how such a right benefits litigants in housing courts specifically).

268. Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963).

269. *Id.* at 344.

270. *See supra* Part III.A.2.

271. OFF. OF CIV. JUST., YEAR FOUR IMPLEMENTATION, *supra* note 198, at 13.

272. *See* STOUT RISIUS ROSS, INC., *supra* note 195, at 4.

273. *See id.* at 4 (describing $226 to $251 million of the $320 million annual cost savings stems from reduced shelter costs).

successful in avoiding eviction when represented by counsel,[274] the City has reaped significant fiscal benefits. Moreover, tenants' right to counsel in eviction proceedings has reduced the number of total evictions in the City each year.[275] Reports estimate that 3,414 rent-regulated affordable housing units have been preserved annually as a direct result of providing legal counsel to tenants in eviction actions.[276] Put simply, more people have been able to stay in their homes because they have been defended from eviction in court. In *Obergefell*, the Court described its third basis for protecting the right to marry as marriage's role in "safeguard[ing] children and families and thus draw[ing] meaning from related rights of childrearing, procreation, and education."[277] The third basis for protecting the right to counsel in eviction proceedings is the home's role in functionally the same enterprises. The home serves as the space where children and families can draw meaning from education—both formal and informal. The home is the bedrock of learning, of developing, and of living. The same is true for adult tenants. Just as substantive due process precedent protects same-sex couples' rights to be married and take advantage of the benefits of marriage, so too should it protect tenants' rights to have a meaningful chance to remain in their homes. Reasoned judgment, when considering many of the factors employed by the *Obergefell* Court, supports this conclusion and thus supports a fundamental right to counsel for tenants requiring eviction defense.

A primary counter to the right argued for in this Note might flow from the so-called "positive rights" cases. In a series of cases during the 1970s and 1980s, the Supreme Court intimated that it is more likely to recognize negative "freedom from" rights than positive "freedom to" rights.[278] That is, rights are more likely to be considered constitutionally protected if they simply protect from state interference rather than require affirmative state action.[279] These cases are typified by *Dandridge v. Williams*,

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274. Tenants have been 77% more likely to prevail when defended by legal counsel in New York. *Id.* "Eighty-six percent of tenants who had representation as a result of New York City's right to counsel legislation were able to remain in their homes. In San Franciso, the eviction filing rate decreased by 10% between 2018 and 2019, and of those receiving full representation, 67 percent stayed in their homes." Sandra Park & John Pollock, *Tenants' Right to Counsel Is Critical to Fight Mass Evictions and Advance Race Equity During the Pandemic and Beyond*, ACLU (Jan. 12, 2021), https://www.aclu.org/news/racial-justice/tenants-right-to-counsel-is-critical-to-fight-mass-evictions-and-advance-race-equity-during-the-pandemic-and-beyond [https://perma.cc/5TD9-SRY3].

275. OFF. OF CIV. JUST., YEAR FOUR IMPLEMENTATION, *supra* note 198, at 12.

276. *See* STOUT RISIUS ROSS, INC., *supra* note 195, at 4

277. Obergefell v. Hodges, 576 U.S. 644, 667 (2015) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

278. *See* Yoshino, *New Birth of Freedom*, *supra* note 73, at 150.

279. *Id.*

San Antonio Independent School District v. Rodriguez, and *DeShaney v. Winnebago Department of Social Services*.[280] In each of these cases, the Court rejected what it perceived as an asserted "affirmative right" that was not constitutionally protected—the amount of welfare provided to family members of differently sized families,[281] the fundamental right to equal government-provided education,[282] and the right to be protected against private violence by social services,[283] respectively.

Critics of a fundamental right to counsel in eviction proceedings would likely be keen to argue that such a right is outside the bounds of traditionally recognized fundamental rights as a positive right.[284] Indeed, it is true that framing the right as "the right to be provided counsel by the government if subject to eviction proceedings" lends itself, to an extent, to a natural interpretation in this vein. However, these critics are similarly inclined to cede that while some constitutional rights appear facially positive, "this appearance leads to a misreading."[285] A canonical example is found in the Confrontation Clause of the Sixth Amendment. The Clause, on natural reading, would seem to provide a positive right to confront an accuser in a criminal trial.[286] Opponents, though, are quick to note that this is not the case. Rather, the Clause's true right is to "not to be convicted without a right to confront the accuser"[287]—a negative right not to be convicted or held by the

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280. Dandridge v. Williams, 397 U.S. 471 (1970) (rejecting a positive right to proportional welfare payments for large families based on family size); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting a positive right to public education); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989) (rejecting a positive right to government aid to prevent deprivations, except for prisoners).

281. *Dandridge*, 397 U.S. at 487 ("We do not decide today that the Maryland regulation is wise . . . or that a more just and humane system could not be devised . . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds . . . .").

282. *Rodriguez*, 411 U.S. at 37–39 (explaining that the challenged law does not violate due process principles or infringe upon fundamental rights because it does not "absolutely deprive" any rights, but rather sets forth a scheme for their provision).

283. *DeShaney*, 489 U.S. at 195 ("[The Due Process Clause] forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure those interests do not come to harm through other means.").

284. *See* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 873–74 (2001) (describing why the Constitution should only recognize substantive positive rights in limited situations and that there are significant differences between positive and negative rights).

285. *Id.* at 869.

286. *See* U.S. CONST. amend. VI.

287. Cross, *supra* note 284, at 869.

government *unless* certain conditions are met.[288] The distinction, then, turns on whether a right can be satisfied by government inaction (a negative right) or whether it requires affirmative government action (a positive right).[289] A fundamental right to counsel in eviction proceedings falls into the latter category. The right asserted in this context is not that the government always has an affirmative obligation to proactively provide tenants with counsel. Rather, it is that if the government chooses to legitimize landlord actions in eviction by requiring that tenants appear in housing court, it must provide basic due process procedures, including counsel assistance to tenants. The government is, of course, free to not require that tenants appear in housing court where landlords enjoy numerous systemic advantages and can thus provide alternative eviction procedures. As such, the asserted right would more closely resemble the Sixth Amendment's Confrontation Clause than, for instance, a positive right to receive welfare benefits. It merely requires that the government maintain certain standards of due process in housing court if it requires their continuance at all.

CONCLUSION

Both the alarming rates of eviction and homeless in the United States over the last several decades and the COVID-19 pandemic's acute effects on tenants facing eviction have underscored the ways in which eviction can cause a tenant's life to downwardly spiral. However, eviction has a long history of inflicting long-lasting damage on former tenants and families. The current crisis in which tenants are made to appear before courts that adjudicate their rights based on considerations outside tenants are forced into forums where they are foreigners to the norms and procedures used to adjudicate their interests severely disadvantage them. As a result, the United States has faced a consistent avalanche of evictions—leading to significant social and economic costs to cities and states across the country. Yet, as legislative experiments around the country have shown, the provision of attorney representation to defend tenants in eviction proceedings markedly improves outcomes and reduces the incidence of evictions where they might be prevented.

The foregoing analysis in this Note articulates how the Supreme Court's substantive due process fundamental rights frameworks in *Glucksberg* and *Obergefell* set forth plausible frameworks through which to

288. *See id.* ("While these rights of criminal defendants are phrased as if they were positive rights *to government assistance*, they in fact are negative rights, not to be convicted or to be held by the government, *unless such assistance is provided*.") (footnote omitted) (emphasis added).

289. *See id.*

derive a fundamental constitutional right to counsel in eviction proceedings. Activists and legal scholars alike have pointed to the severe and significant harm that the United States' eviction systems have inflicted on tenants. Advocates should take into consideration increasingly creative constitutional strategies in seeking to validate the fundamental role of counsel representation to legal proceedings. Particularly in the absence of legislative will to ensure that tenants are able to defend their historically recognized property and liberty interests in housing court, the courts should step in and recognize their fundamental rights. The right to representation when one's home—and the foundation for one's life outside its four walls—is crucial, and should therefore be recognized as such under the Constitution.